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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 6 (Original).

EX PARTE: IN THE MATTER OF JAMES H. SAVAGE, PETITIONER.

PETITION FOR WRIT OF HABEAS CORPUS.

FILED DECEMBER 16, 1889.

SUPREME COURT OF THE UNITED STATES.

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EX PARTE: IN THE MATTER OF JAMES H. SAVAGE, PETITIONER.

PETITION FOR WRIT OF HABEAS CORPUS.

INDEX.

	Original.	Print
Caption	1	1
Motion for leave to file petition, etc., submitted	2	1
Motion for leave to file petition for writ of habeas corpus	3	1
Order granting motion and directing issuance of writ, etc	5	1
Petition for writ of habeas corpus	6	2
Indictment	11	4
Verdict	16	6
Sentence	17	6
Death warrant	18	7
Certificates to record	21	8
Writ of habeas corpus issued	25	9
Stipulation waving personal presence of petitioner	26	9
Telegram from Governor Cooper to Attorney-General Miller, December 17, 1889	27	9
Order assigning cause for hearing	28	10
Writ of habeas corpus and proof of service of same	30	9

1 Supreme Court of the United States. October term 1889.

At the Capitol of the United States, in the city of Washington, and District of Columbia, being the present seat of the national Government of the United States, on the second Monday of October (being the fourteenth day of the same month), in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and fourteenth, the Supreme Court of the United States met agreeably to law.

And afterwards, to wit, on the 13th day of December, A. D. 1889, the following entry appears of record, viz:

2 Ex parte: In the matter of James J. Medley, petitioner; and
Ex parte: In the matter of James H. Savage, petitioner.

Mr. Henry Wise Garnett, of counsel, submitted to the consideration of the court motions for leave to file petitions for writs of habeas corpus, and for leave to prosecute in forma pauperis.

Which said motion for leave to file petition of James H. Savage is in the words and figures following, viz:

3 In the Supreme Court of the United States, in the matter of the application of James H. Savage for a writ of habeas corpus.

UNITED STATES OF AMERICA,
State of Colorado, County of Arapahoe, ss:

Now comes the petitioner, James H. Savage, by his counsel, and moves this honorable court for leave to file a petition praying that a writ of habeas corpus may issue from this court and submits thereon the accompanying brief.

It appearing that the said petitioner is now under sentence of death, and his counsel being advised that execution of such sentence is fixed for some day in the fourth week of the month of December instant, the speedy action of this honorable court in the premises is earnestly prayed.

Respectfully submitted.

MORRIS, TEBBETTS & STOWELL,
Counsel for Petitioner.
A. T. BRITTON,
HENRY WISE GARNETT,
Of Counsel.

4 (Indorsed:) Supreme Court, U. S. 1889, October term. No. 6: Original. Ex parte: In the matter of James H. Savage, petitioner. Motion for leave to file petition for writ of habeas corpus filed Dec. 13, 1889.

5 And afterwards, to wit, on the 16th day of December, A. D. 1889, the following entry appears of record, viz:

Ex parte: In the matter of James J. Medley, petitioner; and
Ex parte: In the matter of James H. Savage, petitioner.

On consideration of the motions for leave to file petitions for writs of habeas corpus herein, and for leave to prosecute in forma pauperis, it is

now here ordered by the court that said motions be and the same are hereby granted; and it is further ordered that writs of habeas corpus issue herein at once, returnable forthwith.

And on the same day, to wit, on the 16th day of December, A. D. 1889, the petition of James H. Savage for writ of habeas corpus was filed, which said petition is in the words and figures following, viz:

6 UNITED STATES OF AMERICA,
State of Colorado, County of Arapahoe, ss:

In the Supreme Court of the United States.

5004. THE PEOPLE OF THE STATE OF Colorado, plaintiff, *vs.* JAMES H. SAVAGE, DEFENDANT. } In the matter of the application of James A. Savage for a writ of habeas corpus.

To the honorable Supreme Court of the United States of America:

The petition of James H. Savage respectfully showeth that your petitioner is a citizen of the United States, residing in the State of Colorado, and is now imprisoned or restrained in his liberty, and confined unjustly, illegally, and without authority of law, as he is advised, by J. A. Lamping, warden of the State penitentiary of the State of Colorado, at Canon City, in the county of Fremont, State of Colorado, for some criminal or supposed criminal matter as appears by the copy of commitment hereto annexed, and other records on file in this case at the above number.

Your petitioner further showeth that an indictment for murder was found against him by the grand jury of Arapahoe County on the 12th day of September, 1889, a certified copy of which indictment is hereto
7 annexed, which said indictment charges that your petitioner did, on the 24th day of June, in the year of our Lord 1889, in the county of Arapahoe and State of Colorado aforesaid, wilfully and of his malice aforethought, kill and murder one Emanuel Harbert, and that in pursuance thereof this petitioner was at the September term of said district court, on the 23d day of October, tried upon said indictment, and found guilty by the jury of murder in the first degree, as appears by a certified copy of the verdict of the jury hereto annexed.

That subsequently, to wit, on the 3d day of December, 1889, he was sentenced to be remanded to the custody of the sheriff of Arapahoe County, and that within twenty-four hours he should be taken by said sheriff and delivered to the warden of the State penitentiary, to be kept in solitary confinement until the fourth week of December, this month, and that then, upon a day and hour in said week to be designated by said warden, should be taken from said place of confinement to the place of execution within the confines of said penitentiary, and that he there be hanged by the neck until he be dead, as more fully appears by a certified copy of the sentence of the court hereto annexed.

Your petitioner further showeth that the act of the assembly of the State of Colorado under which he was sentenced was approved April 19th, 1889, and went into effect July 19th, 1889, and repealed all acts and parts of former acts inconsistent therewith, without a saving clause, and that the crime upon which sentence was passed was charged to be and was

committed on the 24th day of June, 1889; that your petitioner
8 was sentenced under the late act, which changes the penalty in capital cases from that of the old to the disadvantage of your petitioner, making the punishment and its incidents greater, more aggravated in the following points, to wit: (1) The execution is inclosed from public view; (2) change of place of execution; (3) change of executioner; (4) lessens the time in which execution may take place; (5) change of place of imprisonment; (6) adds travel chained to car-seat; (7) substitutes strangers for acquaintances; (8) adds solitary confinement; (9) access only to attendants, counsel, physician, spiritual adviser of his selection, and members of the family; (10) allows not even those to see him except in accordance with prison regulations, which are strict and different from county jail regulations, or rather no regulations; (11) changes the person who shall fix the day and hour of execution; (12) limits the persons who shall or may be present at his death to the sheriff, chaplain, physician, surgeon, six reputable citizens of the State, and three deputies, and may not have any of his family, or any dear friend, or even his counsel present at that awful moment to console him in the presence of death; (13) time of execution shall be kept secret; (14) father, mother, wife, or children never know what took place at his death, or how he died, or what he said, or what messages or directions, if any, he left for them; (15) nor shall the newspapers publish anything except that he was duly executed according to law, when he may not have been executed according to law at all; (16) sheriff shall make return of execution; (17) warden keep
9 record; (18) no notice of the hour of execution; (19) provides for post-mortem dissection; (20) takes away the discretion of the court for prolonging the time of execution from sentence; and that the said act is therefore an ex post facto act as to your petitioner, and is in contravention of Art. I, Sec. 9, of the Constitution of the United States.

The Constitution of the United States provides as follows: Art. I, sec. 9. "No bill of attainder or ex post facto law shall be passed." Also, art. I, sec. 10. "No State shall pass any bill of attainder or expost facto law, etc." Also, art. 3, sec. 2. "The judicial power of the United States courts shall extend to all cases in law or equity arising under this Constitution and the laws of the United States," and that, therefore, as to this crime, the said act is an ex post facto law, and your petitioner can not constitutionally be sentenced to imprisonment or execution under it, as he is advised by his counsel, because the said act is in contravention of the Federal Constitution in its provisions, as above set forth, and therefore void as to this petitioner.

That the circuit court of the United States within and for the district of Colorado, and the supreme court of the State of Colorado, in a case similar to your petitioner's and involving exactly the same points, decided adversely to the petitioner.

Wherefore, to be relieved from said imprisonment your petitioner now prays that a writ of habeas corpus may be issued according to the law in such cases provided, directed to the said J. A. Lamping as such warden, commanding him to produce the petitioner before this court
10 here at such time as this court shall direct, so that your petitioner may be brought before this court to do, submit to, and receive whatsoever may be right in that behalf.

JAMES H. SAVAGE.

STATE OF COLORADO,
County of Fremont, ss:

James H. Savage, being duly sworn, deposes and says that he is the petitioner above named; that he has read the foregoing petition, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those he believes it to be true.

JAMES H. SAVAGE.

Subscribed and sworn to before me this 5th day of December, 1889.
[SEAL.] FRANK P. SHEAFOR,
Notary Public.

My commission expires May 11, 1892.

Certificate of magistracy.—2072.

STATE OF COLORADO,
County of Fremont, ss:

I, I. H. Peabody, county clerk *county clerk* in and for said county, do hereby certify that Frank P. Sheafor, esq., whose name is subscribed to the proof or acknowledgment of the annexed instrument in writing, was, at the time of taking such proof or acknowledgment, a notary public in and for said county, duly commissioned, sworn, and acting as such, and authorized to take the same; and, further, that I am acquainted with his handwriting, and verily believe that the signature to the said proof or acknowledgment is genuine; and, further, that the annexed instrument is executed and acknowledged according to the laws of the State of Colorado.

In testimony whereof I have hereunto set my hand and affixed the seal of said county at Canon City, in said county, this 6th day of December, A. D. 1889.

[SEAL.] I. H. PEABODY,
County Clerk,
By ROBT. D. HALL,
Deputy.

11 District court, Arapahoe County.

5004. THE PEOPLE, &c.,)
vs.
JAMES H. SAVAGE.)

Be it remembered, that heretofore and on, to wit, the 12th day of September, 1889, the same being one of the regular juridical days of the September term of said court, came the members of the grand jury, and returned, among other following indictment.

And said ind.. ent is in words and figures following, to wit:

STATE OF COLORADO,
County of Arapahoe, ss:

In the district court of the second judicial district of the State of Colorado, within and for the county of Arapahoe aforesaid, of the September term thereof, A. D. 1889.

The grand jurors chosen, selected, and sworn within and for the county

of Arapahoe, in the name and by the authority of the people of the State of Colorado, upon their oaths, present:

That James H. Savage, late of the county of Arapahoe aforesaid, on, to wit, the 24th day of June, in the year of our Lord one thousand eight hundred and eighty-nine, in the county of Arapahoe aforesaid, in
12 the State of Colorado, feloniously, wilfully, deliberately, with premeditation and of his malice aforethought, did kill and murder one Emanuel Harbert, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Colorado.

Second count. And the grand jurors aforesaid, chosen, selected, and sworn as aforesaid, upon their oaths aforesaid, in the name and by the authority of the people of the State of Colorado, aforesaid, do further present:

That James H. Savage, late of the county of Arapahoe aforesaid, on to-wit: the 24th day of June, in the year of our Lord one thousand eight hundred and eighty-nine, in the county of Arapahoe aforesaid, in the State of Colorado, with force and arms in and upon the person of one Emanuel Harbert, in the peace of the people then and there being, feloniously, willfully, deliberately, with premeditation and of his malice aforethought, did make an assault, and that the said James H. Savage a certain pistol commonly called a revolver, the said pistol being then and there charged and loaded with gunpowder, and lead bullets, which said pistol he the said James H. Savage in his right hand then and there had and held, then and there feloniously, wilfully, deliberately, with premeditation and of his malice aforethought did discharge and shoot off, at, to, against, and upon the person of him, the said Emanuel Harbert; and that the said James H. Savage, with one of the leaden bullets aforesaid, out of the pistol aforesaid, then and there by force of the gun-
13 powder aforesaid by the said James H. Savage discharged and shot off as aforesaid, then and there feloniously, wilfully, deliberately, with premeditation and of his malice aforethought did strike, penetrate, and wound him the said Emanuel Harbert in and upon the right shoulder of him, the said Emanuel Harbert, giving to him, the said Emanuel Harbert, then and there, with one of the leaden bullets aforesaid, discharged and shot out of the pistol aforesaid, by the said James H. Savage in and upon the right shoulder of him, the said Emanuel Harbert, one mortal wound of the depth, to wit, of four inches, and of the breadth, to wit, of one-half an inch; and that the said James H. Savage, with one of the other leaden bullets aforesaid, out of the pistol aforesaid, then and there, by force of the gunpowder aforesaid, by the said James H. Savage discharged and shot off as aforesaid, then and there, feloniously, wilfully, deliberately, with premeditation and of his malice aforethought, did strike, penetrate, and wound him, the said Emanuel Harbert, in and upon the right side of the head of him, the said Emanuel Harbert, giving to him, the said Emanuel Harbert, then and there, with one of the leaden bullets aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid by him, the said James H. Savage, in and upon the right side of the head of him, the said Emanuel Harbert, one mortal wound, of the depth, to wit, of five inches, and of the breadth, to wit, about one-half an inch; and that the said James H. Savage, with one of the other leaden bullets aforesaid, then and there

by force of the gunpowder aforesaid, by the said James H. Savage discharged and shot off as aforesaid, then and there feloniously, wil-
14 fully, deliberately, with premeditation and of his malice aforethought did strike, penetrate, and wound him, the said Emanuel Harbert, in and upon the left side of the face and near the outer corner of the left eye of him, the said Emanuel Harbert, giving to him, the said Emanuel Harbert, then and there, with one of the leaden bullets aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid, by the said James H. Savage, in and upon the left side of the face of him, the said Emanuel Harbert, one mortal wound, of the depth, to wit, of five inches, and of the breadth, to wit, of one half an inch, of which said mortal wounds he, the said Emanuel Harbert then and there did instantly die. And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said James H. Savage him the said Emanuel Harbert, in manner and form aforesaid, then and there feloniously, wilfully, deliberately, with premeditation, and of his malice aforethought, did kill, and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Colorado.

ISAAC N. STEVENS,
District Attorney.

15 Witnesses for the people:

W. H. LOAR, City Hall.	S. A. ADAMS, 2733 Larimer.
D. O. GOADING, 2720 Champa.	CHAS. T. WYGANT, 2757 Arapahoe.
J. S. BATES, 2619 California.	C. J. MONEMAN, 2727 Larimer.
WILLIAM ALLEN, 1217 26th.	A. TRUDELL, 2732 Larimer.
GEO. OSBORN, 2628 Market.	WILLIAM ZEITZ, 28th and Market.
DR. C. P. FRENCH, 2515 Arapahoe.	JAMES BUCHANAN, 2735 Champa.
WILLIAM FLANNEY, 2741 Market.	DR. A. K. WORTHONGTON.
THOS. WALTON, 3816 Market.	HENRY DAVIS, 2829 Blake.
R. O. FULENWILDER, 2640 Larimer.	

(Endorsed:) No. 5004. In the district court. The people of the State of Colorado *vs.* James H. Savage. Indictment for murder. A true bill. John J. Hagus, foreman of grand jury. Filed in district court, Arapahoe Co., Colo., Sep. 12, 1889. Matt. Adams, clerk. W. H. Loar, prosecuting witness.

16 And afterwards, and upon, to wit, the 23rd day of October, A D. 1889, the same being one of the regular judicial days of the September term of said court, came the members of the jury, heretofore empanneled for the trial of said cause, and returned into the court their verdict.

And said verdict is in words and figures as follows, to wit:

We, the jury, find the defendant, James H. Savage, guilty of murder in the first degree, as charged in the indictment.

R. N. POLLOCK, *Foreman.*

17 And afterwards, and on, to wit, the 3rd day of December, A. D. 1889, the same being one of the regular judicial days of the Sep-

tember term of said court, the court pronounced sentence upon said defendant, in words and figures as follows, to wit:

The sentence of the court is, that you, James H. Savage, be remanded to the custody of the sheriff of this county, and within twenty-four hours you be taken by the said sheriff and delivered into the custody of the warden of the penitentiary of this State; that you be, by said warden, kept in said penitentiary in solitary confinement until the fourth week of December, this month, that upon a day and hour in said week, to be designated by said warden, you be taken from said place of confinement to the place of execution within the confines of the said penitentiary, and that you be there hanged by the neck until you be dead.

18 And afterwards and upon, to wit, the same day there issued out of the clerk's office of said court the death warrant in said case, directed to the sheriff of said county and to the warden of the penitentiary of the State of Colorado;

And said death warrant is in words and figures as follows, to wit:

STATE OF COLORADO,
County of Arapahoe, ss:

The people of the State of Colorado, to the sheriff of Arapahoe County and to the warden of the penitentiary of the State of Colorado, greeting:

Whereas at the September term, A. D. 1889, of our district court of the second judicial district of the State aforesaid, sitting in and for the county of Arapahoe, a certain indictment was by the grand jury then attending presented against James H. Savage for the crime of murder, whereupon such proceedings were had in our said court that afterward and on the 3d day of December, A. D. 1889, it was adjudged by our said court that the said James H. Savage be remanded to the custody of the sheriff of said Arapahoe County; that within twenty-four hours he, the said James H. Savage, be taken by the said sheriff and delivered into the custody of the warden of the penitentiary of the State of Colorado;

19 that he, the said James H. Savage, be by said warden kept in said penitentiary in solitary confinement until the fourth week in the month of December, A. D. 1889; and that upon a day and hour in said week to be designated by said warden that he, the said James H. Savage, be taken from said place of confinement to the place of execution within the walls and the confines of said penitentiary, and that he there be hanged by the neck until he be dead:

Now, therefore, we command you, the sheriff of the said county of Arapahoe, that you take the body of said James H. Savage and him safely keep, convey, and deliver to the warden of the said penitentiary within twenty-four hours, together with this warrant. And do you, the said warden, receive the body of the said James H. Savage and him safely keep in solitary confinement within the walls of said penitentiary until the fourth week in the month of December instant, when you will upon a day and hour in said fourth week of said December, to be designated by you, take the body of said James H. Savage from said place of confinement to the place of execution so designated by you, and within the confines of said penitentiary and him, the said James H. Savage, then and there hang by

the neck until he shall be dead, according to the judgment of our said district court, as aforesaid, and in accordance with the law of this State relating to executions for capital crime. And that after the full execution of the said judgment of our said district court as aforesaid, you, the said warden of the said penitentiary, are hereby commanded to make re-
20 turn of all your doings upon this warrant to the said district court, in accordance with the law in such case made and provided.

Witness, Matt Adams, clerk of our said court, with the seal thereof hereunto affixed, at office in the city of Denver, this 3rd day of December, A. D. 1889.

[SEAL.]

MATT ADAMS,
Clerk,
By E. F. DUNLEVY,
Deputy Clerk.

(Indorsed): No. 5004. The People, etc., *vs.* James H. Savage. Death warrant.

21 STATE OF COLORADO,
County of Arapahoe, ss:

I, Matt. Adams, clerk of the district court of Arapahoe County, State aforesaid, do hereby the above and foregoing to be a true, complete, and perfect transcript and copy of the indictment, verdict, sentence, and death warrant had and entered of record in a certain cause in said court lately depending, wherein the people of the State of Colorado was plaintiff and James H. Savage was defendant, as the same now remain on file and of record in this office.

Witness my hand and the seal of said court at the court-house in Denver, county and State aforesaid, this 7th day of December, A. D. 1889.

[SEAL.]

MATT. ADAMS,
Clerk.

22 STATE OF COLORADO,
County of Arapahoe, ss:

I, George W. Allen, presiding judge of the district court of the second judicial district of the State of Colorado, do hereby certify that Matt. Adams, whose name is appended to the foregoing certificate as clerk of said district court, was such clerk when said certificate was signed, was duly commissioned and qualified to act as such clerk, and that his signature and the seal of said court there attached are genuine and entitled to full credence, and his said certificate is in due form.

Given under my hand and seal this 7th day of December, A. D. 1889.

GEO. W. ALLEN, [SEAL.]
Judge.

STATE OF COLORADO,
County of Arapahoe, ss:

I, Matt. Adams, clerk of the district court of the second judicial district of the State of Colorado, do hereby certify that George W. Allen, whose name is subscribed to the foregoing certificate, is the presiding judge of the district court of the second judicial district of the State of

Colorado, duly commissioned and qualified according to law, and was such presiding judge at the time when his signature was affixed to said certificate, and I further certify that the signature of said George W. Allen is genuine, and was affixed to said certificate in my presence.

Witness my hand and the seal of said court at the court-house in Denver, county and State aforesaid, this 7th day of December, A. D. 1889.

[SEAL.] MATT. ADAMS,
Clerk District Court.

23 (Indorsed:) In the Supreme Court of the United States. In the matter of the application of James H. Savage for a writ of habeas corpus. Petition and record.

24 Supreme Court U. S. 1889, October term. No. 6. Original. Ex parte in the matter of James H. Savage, petitioner. Petition for writ of habeas corpus. Filed Dec'r 16, 1889.

25 And on the same day, to wit, on the 16th day of December, A. D. 1889, the writ of habeas corpus in this cause was issued to the marshal.

And afterwards, to wit, on the 18th day of December, A. D. 1889, a stipulation was filed, which said stipulation is in the words and figures following, viz.:

26 In the Supreme Court of the United States, in the matter of the application of James H. Savage for a writ of habeas corpus.

It is agreed by the State of Colorado and by said petitioner, James H. Savage, that the personal presence of the petitioner in this court in these proceedings is waived, and that the hearing may be had and decision rendered in the same manner and with the same effect as if the petitioner were bodily present in court in pursuance of said writ of habeas corpus.

SAMUEL JONES,
Attorney-General of Colorado.
By W. H. H. MILLER,
A. T. BRITTON, and
HENRY WISE GARNETT,
Of Counsel for Petitioner, James H. Savage.

Copy of telegram from governor Colorado attached.

27 (Copy.)

DENVER, COLORADO, *Dec.* 17, 1889.

To W. H. MILLER,
Att'y-General, Wash'n:

In the matter of writ of habeas corpus for Medley and Savage, under sentence of death, I will grant reprieve until a hearing can be had before the Supreme Court. Please advise me what time the reprieve should be

for. The Attorney-General of Colorado requests me to say that he authorizes you to stipulate the proceedings can be had without the presence of the prisoners before the Supreme Court.

(Signed) JOB A. COOPER,
Governor.

(Indorsed:) No. 6. Original. In the matter of the petition of James H. Savage for writ of habeas corpus.

28 Supreme Court U. S. 1889, October term. No. 6. Original. Ex parte in the matter of James H. Savage, petitioner. Stipulation waiving personal presence of petitioner, and as to hearing of cause, with copy of telegram. Filed Dec'r 18, 1889.

29 And on the same day, to wit, on the 18th day of December, A. D. 1889, the following entry appears of record, viz:

No. 5. Original. Ex parte in the matter of James J. Medley, petitioner.

No. 6. Original. Ex parte in the matter of James H. Savage, petitioner.

Ordered by the court that these cases be, and they are hereby, assigned for argument on the second Monday in January next at the head of the call for that day.

And afterwards, to wit, on the 4th day of January, A. D. 1890, the writ of habeas corpus, with proof of service of same, was filed, which said writ is in the words and figures following, viz:

30 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to J. A. Lamping, warden of the State penitentiary of the State of Colorado, at Canon City, [SEAL.] Fremont County, State of Colorado, greeting:

We command you that the body of James H. Savage, in your custody detained, as it is said, by whatever name he may be charged, together with the return of the day and cause of his detention, you have before the Supreme Court of the United States, sitting in the Capitol of the United States, at the city of Washington, being the present seat of the National Government, forthwith, then and there, to receive and submit to all and singular, whatsoever the said Supreme Court shall consider concerning him in this behalf. And have you then and there this writ with your doings in the premises.

Witness the honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 16th day of December, A. D. 1889.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

31 CANON CITY, COLO.;
Dec. 30th, 1889.

I hereby accept service of a copy of within writ.

J. A. LAMPING,
Warden.
Per G. E. DUDLEY,
Deputy.

UNITED STATES OF AMERICA,
District of Colorado, ss:

DENVER, COLO.,
Dec. 31*st*, 1889.

I do hereby certify that I have duly served the within writ by delivering a true copy to J. A. Lamping, by his deputy, George E. Dudley, on the 30th day of December, A. D. 1889. This writ therefore returned executed as the law directs this 31st day of December, A. D. 1889.

ZEPH. T. HILL,
U. S. Marshal.
By C. A. MORRISON,
Deputy.

Marshal's fees: Service, 2.00; 160 miles going, at 06c., $9.60; $11.60.

SUPREME COURT OF THE UNITED STATES,
MARSHAL'S OFFICE,
December 16, 1889.

I, J. M. Wright, marshal of the Supreme Court of the United States, do hereby authorize and deputize Z. T. Hill to serve the within writ and to make due return thereof.

J. M. WRIGHT,
Marshal.

(R.—158–329. Received Dec. 19, 1889, U. S. marshal's office, district Colorado.)

32 (Indorsement:) Supreme Court U. S. 1889, October term. No. 6. Original. Ex parte in the matter of James H. Savage, petitioner. Writ of habeas corpus and proof of service of same.
(Stamp:) Office Supreme Court U. S. Filed Jan. 4, 1890. James H. McKenney, clerk.

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1 IN THE SUPREME COURT OF THE UNITED STATES.

THE PEOPLE OF THE STATE OF COLORADO, PLAINTIFF,
vs. JAMES H. SAVAGE, DEFENDANT.

UNITED STATES OF AMERICA,
State of Colorado, County of Arapahoe:

In the matter of the application of James H. Savage for a writ of habeas corpus.

To the honorable Supreme Court of the United States of America:

Joseph A. Lamping, warden of the State penitentiary of the State of Colorado, the respondent in the writ of habeas corpus issued herein for return thereto, respectfully submits to your honorable court that it is true that the said James H. Savage therein named is confined and restrained of his liberty by the said Joseph A. Lamping, by virtue of his office as warden as aforesaid, but the said Joseph A. Lamping alleged that the said James H. Savage is restrained lawfully by virtue of a writ issued out of the district court of of Arapahoe County, State of Colorado, of which the following is a copy:

2 STATE OF COLORADO,
County of Arapahoe, ss:

The people of the State of Colorado, to the sheriff of Arapahoe County, and to the warden of the penitentiary of the State of Colorado, greeting:

Whereas at the September term, A. D. 1889, of our district court of the second judicial district of the State aforesaid, sitting in and for the county of Arapahoe, a certain indictment was by the grand jury then attending presented against James H. Savage for the crime of murder, whereupon such proceedings were had in our said court, that afterwards and on the third day of December, A. D. 1889, it was adjudged by our said court that the said James H. Savage be remanded to the custody of the sheriff of said Arapahoe County; that within twenty-four hours he, the said James H. Savage, be taken by the said sheriff and delivered into the custody of the warden of the penitentiary of the State of Colorado; that the said James H. Savage be, by the said warden, kept in said penitentiary in solitary confinement until the fourth week in the month of December, A. D. 1889, and that upon a day and hour in said week, to be designated by said warden, that he, the said James H. Savage, be taken from the said place of confinement to the place of execution within the walls and the confines of said penitentiary, and that he there be
3 hanged by the neck until he be dead. Now, therefore, we command you, the sheriff of the said county of Arapahoe, that you

take the body of said James H. Savage and him safely keep, convey, and deliver to the warden of the said penitentiary within twenty-four hours, together with this warrant. And do you, the said warden, receive the body of the said James H. Savage and him safely keep in solitary confinement within the walls of said penitentiary until the fourth week in the month of December instant, when you will, upon a day and hour in said fourth week of said December to be designated by you, take the body of the said James H. Savage from said place of confinement to the place of execution so designated by you and within the confines of said penitentiary, and him, the said James H. Savage, then and there hang by the neck until he shall be dead, according to the judgment of our said district court as aforesaid and in accordance with the law of this State relating to executions for capital crime. And that after the full execution of said judgment of our said district court as aforesaid, you, the said warden of said penitentiary, are hereby commanded to make return of all your doings upon this warrant to the said *to the said* district court in accordance with the law in such case made and provided.

Witness, Matt Adams, clerk of our said court, with the seal thereof hereunto affixed at office in the city of Denver, this third day of December, A. D. 1889.

[District court seal.]

MATT ADAMS,
Clerk,
By E. F. DUNLEVY,
Deputy Clerk.

4 [Copy.]

STATE OF COLORADO,
Governor's Office, Denver:

DECEMBER 20, 1889.

EXECUTIVE ORDER.

Whereas in the matter of James J. Medley and James H. Savage, convicted of murder in the first degree in the district court of Arapahoe County at the September term, A. D. 1889, I am officially advised that a writ of habeas corpus has been issued from the Supreme Court of the United States for the said James J. Medley and James H. Savage:

Therefore, in order that a hearing can be had in these proceedings, the warden of the State penitentiary is hereby directed and commanded to suspend and delay the execution of the respective sentences of the court in the said matter until the third week in March, A. D. 1890; and upon a day and hour in said week to be designated by said warden he will faithfully execute the respective sentences of the said court, unless otherwise directed by competent authority; and these presents shall be his full and sufficient warrant for so doing.

Given under my hand and official seal at the city of Denver, this 20th day of December, A. D. 1889.

(Signed)

JOB A. COOPER,
Governor.

[Executive office seal, State of Colorado.]

5 [Copy.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States, to J. A. Lamping, warden of the State penitentiary of the State of Colorado, at Cañon City, Fremont County, State of Colorado, greeting:

We command you that the body of James H. Savage, in your custody detained, as it is said, by whatever name he may be charged, together with the return of the day and cause of his detention, you have before the Supreme Court of the United States, sitting in the Capitol of the United States at the city of Washington, being the present seat of the National Government, fourthwith, then and there to receive and submit to all and singular whatsoever the said Supreme Court shall consider concerning him in this behalf, and have you then and there this writ with your doings in the premises.

Witness the honorable Melville W. Fuller, Chief-Justice of the Supreme Court of the United States, the 16th day of December, A. D. 1889.

[SEAL.] JAMES H. MCKENNY,
Clerk of the Supreme Court of the United States.

6 which is the true cause of his imprisonment.

That the said Joseph A. Lamping does not produce the body of the said James H. Savage before this honorable court for the reason that by an order heretofore entered in this court it was directed that the body of the said James H. Savage be not produced in court.

Wherefore, the said Joseph A. Lamping makes return of said writ as therein he is directed.

J. A. LAMPING,
Warden of State Penitentiary of State of Colorado.

Dated Jan'y 9th, 1890.

Subscribed and sworn to before me this 9th day of January, A. D. 1890.

[SEAL.] FRANK P. SHEAFOR,
Notary Public.

My commission expires May 11, 1892.

7 (Indorsement on cover:) Supreme Court, U. S. 1889, October term. No. 6. Original. Ex parte: In the matter of James H. Savage, petitioner. Return to writ of habeas corpus. Office Supreme Court U. S. Filed Jan. 13, 1890. James H. McKenney, clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

UNITED STATES OF AMERICA,
State of Colorado, County of Arapahoe, } ss:

In the Supreme Court of the United States.

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff,
vs.
JAMES J. MEDLEY, Defendant.

In the matter of the application of James J. Medley for a writ of *habeas corpus.*

To the Honorable Supreme Court of the United States of America:

The petition of James J. Medley respectfully showeth that your petitioner is a citizen of the United States, residing in the State of Colorado, and is now imprisoned or restrained in his liberty, and confined unjustly, illegally, and without authority of law, as he is advised, by J. A. Lamping, warden of the State penitentiary of the State of Colorado, at Cañon City, in the county of Fremont, State of Colorado, for some criminal or supposed criminal matter, as appears by the copy of commitment hereto annexed, and other records on file in this case at the above number.

Your petitioner further showeth that an indictment for murder was found against him by the grand jury of Arapahoe county on the 5th day of June, 1889, a certified copy of which indictment is hereto annexed, which said indictment charges that your petitioner did, on the 13th day of May, in the year of our Lord 1889, in the county of Arapahoe and State of Colorado aforesaid, wilfully and of his malice aforethought, kill and murder one Ellen Medley, and that in pursuance thereof this petitioner was, at the September term of said district court, on the 24th day of September, tried upon said indictment and found guilty by the jury of murder in the first degree, as appears by a certified copy of the verdict of the jury, hereto annexed.

That subsequently, to wit, on the 29th day of November, 1889, he was sentenced to be remanded to the custody of the sheriff of Arapahoe county, and that within twenty-four hours he should be taken by said sheriff and delivered to the warden of the State penitentiary, to be kept in solitary confinement until the fourth week of the month of December next, and that then, upon a day and hour in said week to

be designated by said warden, should be taken from said place of confinement to the place of execution, within the confines of said penitentiary, and that he there be hanged by the neck until he be dead, as more fully appears by a certified copy of the sentence of the court, hereto annexed.

Your petitioner further showeth that the act of the Assembly of the State of Colorado under which he was sentenced was approved April 19th, 1889, and went into effect July 19th, 1889, and repealed all acts and parts of former acts inconsistent therewith, without a saving clause, and that the crime upon which sentence was passed was charged to be and was committed on the 13th day of May, 1889; that your petitioner was sentenced under the late act, which changes the penalty in capital cases from that of the old, to the disadvantage of your petitioner, making the punishment and its incidents greater, more aggravated, in the following points, to wit: (1) the execution is enclosed from public view; (2) change of place of execution; (3) change of executioner; (4) lessens the time in which execution may take place; (5) change of place of imprisonment; (6) adds travel, chained to car seat; (7) substitutes strangers for acquaintances; (8) adds solitary confinement; (9) access only to attendants, counsel, physician, spiritual adviser of his selection, and members of the family; (10) allows not even those to see him, except in accordance with prison regulations, which are strict and different from county-jail regulations, or rather no regulations; (11) changes the person who shall fix the day and hour of execution; (12) limits the persons who shall or may be present at his death to the sheriff, chaplain, physician, surgeon, six reputable citizens of the State, and three deputies, and may not have any of his family or any dear friend, or even his counsel, present at that awful moment to console him in the presence of death; (13) time of execution shall be kept secret; (14) father, mother, wife, or children never know what took place at his death or how he died or what he said or what messages or directions, if any, he left for them; (15) nor shall the newspapers publish anything except that he was duly executed according to law, when he may not have been executed according to law at all; (16) sheriff shall make return of execution; (17) warden keep record; (18) no notice of the hour of execution; (19) provides for post-mortem dissection; (20) takes away the discretion of the court for prolonging the time of execution from sentence, and that the said act is therefore an *ex post facto* act as to your petitioner, and is in contravention of art. 1, sec. 9, of the Constitution of the United States.

The Constitution of the United States provides as follows—Art. 1, sec. 9: "No bill of attainder or *ex post facto* law shall be passed;" also art. 1, sec. 10: "No State shall pass any bill of attainder or *ex post facto* law," etc.; also art. 3, sec. 2: "The judicial power of the United States courts shall extend to all cases in law or equity arising under this Constitution and the laws of the United States;" and that therefore, as to this crime, the said act is an *ex post facto*

law, and your petitioner cannot, constitutionally, be sentenced to imprisonment or executed under it, as he is advised by his counsel, because the said act is in contravention of the Federal Constitution in its provisions, as above set forth, and therefore void as to this petitioner.

That the circuit court of the United States within and for the district of Colorado and the supreme court of the State of Colorado, in a case similar to your petitioner's and involving exactly the same points, decided adversely to the petitioner.

Wherefore, to be relieved from said imprisonment, your petitioner now prays that a writ of *habeas corpus* may be issued, according to the law in such cases provided, directed to the said J. A. Lamping, as such warden, commanding him to produce the petitioner before this court here at such time as this court shall direct, so that your petitioner may be brought before this court to do, submit to, and to receive whatsoever may be right in that behalf.

J. J. MEDLEY.

STATE OF COLORADO, }
County of Fremont, } *ss:*

James J. Medley, being duly sworn, deposes and says that he is the petitioner above named; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those he believes it to be true.

J. J. MEDLEY.

Subscribed and sworn to before me this third day of December, 1889.

[Seal Samuel A. Bentley, Notary Public, Fremont County, Colorado.]

SAMUEL A. BENTLEY,
Notary Public.

Com. expires May 20, 1891.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

IN THE MATTER
of the
APPLICATION OF JAMES J. MEDLEY FOR A WRIT OF HABEAS CORPUS.

IN THE MATTER
of the
APPLICATION OF JAMES H. SAVAGE FOR A WRIT OF HABEAS CORPUS.

UNITED STATES OF AMERICA,
STATE OF COLORADO,
COUNTY OF ARAPAHOE, } *ss.*

Brief of Respondent.

In addition to the statute of the State of Colorado set out in the brief of counsel for the petitioners, other statutes of the State should be known to the Court. When not otherwise stated, references are made to the

general sections of the Revised Statutes of the State of 1883. The following sections are cited in the brief of petitioners:

That part of section 709 which is pertinent: "Every person convicted of murder of the first degree, shall suffer death, and every person convicted of murder of the second degree, shall suffer imprisonment in the penitentiary for a term not less than ten years, and which may extend to life." In force since May 12, 1883.

Also, section 729: "The manner of inflicting the punishment of death shall be by hanging the person convicted by the neck until death, at such time as the Court shall direct, not less than fifteen nor more than twenty-five days from the time sentence is pronounced, unless for good cause the Court or Governor may prolong the time."

We cite the following sections:

Section 730: "The Court may order, on the application of any respectable surgeon or surgeons, that the body of the convict shall, after death, be delivered to such surgeon or surgeons for dissection; *Provided*, The same shall not be claimed by any one related to the person executed, by consanguinity or affinity, or any friend desiring to give the body christian burial." This same section is found on page 237, section 184, of the Revised Statutes of Colorado of 1868, and has been in force since that year, and is continued in the General Laws of 1877, and in General Statutes of 1883.

Section 83: "All public officers, sheriffs, coroners, jailers, constables, or other officers or persons having in custody any person committed, imprisoned, or restrained of his liberty, for any alleged cause whatever, shall, except in cases of imminent danger of escape, admit any practicing attorney at law in this State whom such person restrained of his liberty may desire to see or consult, to

see or consult such person so imprisoned, alone and in private, at the jail or other place of custody; any officer violating this provision shall forfeit and pay one hundred dollars to the person aggrieved, to be recovered by action of debt in any Court of competent jurisdiction." This section has been in force and upon the statute books since 1861.

Section 2601: "The following persons are authorized to visit the penitentiary at pleasure: The Governor, Judges of the Supreme and District Courts, and all regular officiating ministers of the gospel; and no other person shall be permitted to go within the walls of the prison where convicts are confined, except by special permission of the warden." This section has been in force since 1877.

Section 2553: "The Board of Commissioners (of the penitentiary) should make such rules and regulations for the government, discipline and police of the penitentiary, and for the punishment of persons confined, not inconsistent with law, as they deem expedient. They shall exercise a general superintending control over the government and discipline of the penitentiary, cause such rules and regulations as they may prescribe for the government and discipline of the prison to be printed and placed in some conspicuous place in said prison, and shall visit said prison as often as once in three months." In force since 1877.

Section 2554: "The Board of Commissioners shall have power, and it shall be their duty, to examine and enquire into all matters connected with the government, discipline and police of the penitentiary, the punishment and treatment of the prisoners. They shall inspect them; listen to any complaint of oppression or misconduct on the part of the warden or any of the employés under him, and for that purpose the president or any member

of the board, while acting under the direction of said board, shall have the powers of a justice of the peace to issue subpœnas and compel the attendance of witnesses and administer oaths." In force since 1877.

Section 2580: "The Board of Commissioners shall have power to make such arrangements for medical attendance as in their judgment may be required, and for that purpose may contract with any regular authorized physician, in such manner as they think most advantageous." In force since 1877.

Section 1822: "When there is no sufficient jail in any county wherein any criminal offense shall have been committed, any justice of the peace, county or district judge, upon the application of the sheriff, may order any person charged with any criminal offense, and ordered to be committed to jail, to be sent to the county nearest having a sufficient jail," with other provisions for re-delivering the prisoner, cost of keeping, etc. In force since 1877.

The act of 1889, complained of herein, is correctly printed in the Brief for petitioners, beginning at page 4.

It is believed that the above extracts from the public statutes of Colorado present the law of this State bearing upon this question.

For convenience of reference, and because it ably discusses the questions involved herein, we print the opinion of the Supreme Court of this State, involving the construction of the act of 1889.

In re HENRY TYSON, In Supreme Court. No. 2596.

Application for release from imprisonment on Habeas Corpus.

HAYT, J., delivered the opinion of the Court.

The petitioner was indicted at the April term of the District Court of Arapahoe County, for the murder of

one John King. The murder is charged to have been committed upon the 18th day of May, A. D. 1889. The cause was tried and a verdict of guilty of murder of the first degree rendered some time during the following June, although sentence was not pronounced upon the verdict until the 26th day of July; at which time he was sentenced to suffer the death penalty within the walls of the State Penitentiary at such time during the third week in the month of August following as the warden of said institution might select. The week of execution has been postponed from time to time by order of the Governor. The petitioner, at the time of issuing this writ of habeas corpus being in custody of the sheriff of Arapahoe county, awaiting a judicial determination of an inquisition of lunacy, which had been commenced at the instance of his counsel. By the law in force at the time of trial, as well as at the time the offense was alleged to have been committed, the penalty for murder of the first degree was death; and, by statute, it was provided that this punishment should be inflicted by hanging the person convicted by the neck until dead, at such time as the Court should direct, not less than fifteen nor more than twenty five days from the time of sentence. General Laws, section 729. Under this law, it was the practice to keep the defendant in close confinement in the county jail from the time sentence was pronounced until the day appointed for execution. He was then executed under the direction of the sheriff within the county where the conviction was obtained. The Seventh General Assembly enacted a law substituting the State penitentiary for the jail of the county as the place of such confinement, and directing that whenever it became necessary to inflict the death penalty in the future, the person convicted should be executed within the walls of such penitentiary. This statute contains no saving clause, but extends to all cases in which the death penalty is hereafter to be in-

flicted, without regard to the time at which the crime may have been committed, whether before or after the adoption of the act; and also contains a clause repealing all other acts or parts of acts in conflict therewith. Other provisions of the statute will be given in another portion of the opinion. The act received the Governor's approval upon the 19th day of April, 1889, and went into effect ninety days thereafter. The petitioner having been sentenced upon the verdict of the jury after this law had gone into effect, and in accordance with its terms we are now asked to declare such sentence void; and discharge the prisoner for the alleged reason that such law is *ex post facto* as to him, and consequently, obnoxious to both the Federal and State constitutions. The argument advanced being that the prisoner was in jeopardy under the old law, but that such law having been repealed since his trial, he cannot be punished thereunder; that the law is *ex post facto* and unconstitutional as to him, therefore, he cannot be punished at all, but must be discharged.

In our judgment, the new law does not come under the constitutional inhibition relied upon. Calder *vs.* Bull, 3 Dall., 386, 390, is recognized as the leading case in this country upon the subject, and in that case, Chase, J. said:

"I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punished such action. 2nd. Every law that aggravates a crime, or makes it greater than it was when committed. 3d. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and receives less of different testimony than the law required at the time of the commission of the offense, in order to convict the offender."

The statute of which complaint is made does not attempt to make that criminal which was not criminal before. It does not aggravate the crime, nor alter the rules of evidence. It cannot, therefore, be considered as an *ex post facto* law under the rule given, unless it changes the punishment for the offense to the disadvantage of the defendant. That it does so change the punishment, is urged by counsel in that it changes the place of execution and provides for solitary confinement in the penitentiary for the period between sentence and execution, and for the further reason that it permits the Court to shorten the time between sentence and execution from fifteen days to two weeks as it is said; other changes were enumerated in the argument but these are the ones principally urged, the others being subsidiary, if these objections are not well taken, the others fall with them.

It is to be remembered that by section 2 of the act of 1883, the same being section 709 of the General Statutes, murder is divided into two degrees, i. e., murder of the first degree and murder of the second degree. This section has stood from its adoption unrepealed and without amendment. By this act, death was fixed as the punishment for murder of the first degree. By section 729, General Statutes, it is provided that this punishment shall be inflicted by hanging, and this is not changed by the amendment of 1889; so it will be seen that at the time of the perpetration of the crime, and at the time of the trial, the punishment for murder in the first degree was death by hanging; and such is still the law.

It is a part of the public history of the State that prior to the passage of this act the death penalty with us was usually inflicted in public at a previously advertised hour, in the presence of a large concourse of people, and the particulars of the execution published in the public journals. In deference to the wish of many good citizens

who were of the opinion that the tendency of such proceedings was deterimental to the public morals, the recent statute was passed, requiring executions in the future to be conducted privately at the penitentiary, enjoining secrecy upon the few persons required or permitted to be present; and making it a misdemeanor punishable by fine for such persons to disclose the details of the execution, or for the press to publish the same. To accomplish the desired change, it became necessary to change certain incidents connected with the punishment, but no attempt was made to change the punishment itself. This remains the same as before the passage of the act.

To the argument based upon the change in the place of execution, we say that in legal contemplation there is no difference between an execution in one place within the State and in another. The punishment is not aggravated by being inflicted in the county of Fremont rather than in the county of Arapahoe, where the trial took place. The penalty has not been changed, but only the locality where it is to be inflicted. The case of Carter *vs.* Burt, 94 Mass., 425, is directly in point upon this question. In that case the prisoner had been convicted of being a common seller of intoxicating liquors without license, and sentenced to pay a fine of $50 and to be imprisoned in the house of correction for three months. By the Statute in force at the time the offense was committed, it was provided that the imprisonment in such cases should be in the house of correction, in the county where the court was holden, while by a subsequent enactment, in force at the time of sentence, it was provided that any person under sentence for such offenses might be committed, at the discretion in the Court, "to the house of correction in any county of the commonwealth in the same manner as such person might be committed in the county where the court is so holden." It was

claimed in argument that the later law aggravated the punishment and was, therefore, *ex post facto* as to such offense; but the Court held that such argument was fallicious; that the rights of a person convicted were not materially affected by the change, and that the punishment was not aggravated by an imprisonment in one county rather than in another. If the argument in this case, based upon the change in the place of execution, is sound, then in case future legislation should change the location of the Penitentiary to a county other than Fremont and thereby change the place of execution, it would likewise follow that a change so made would be subject to the same objections—a conclusion we cannot endorse. We think the argument unsound, and that the constitutional objection based thereon is not well taken. In arriving at this result, we have not overlooked the case of Garvey *vs.* The People, 6 Colo., 559. It seems to us, however, that counsel have confounded certain incidents connected with the administration of the penalty with the punishment itself.

Counsel say that the punishment in this case is aggravated by reason of the change in place of confinement from the county jail to the Penitentiary. We are aware that in many well considered cases it has been held that a change in the place of confinement from an institution where criminals convicted of minor offenses are incarcerated to one established for the imprisonment of those convicted of more heinous crimes, has been held as an aggravation of the punishment on account of the disgrace and reproach attached to the confinement with criminals of a more depraved and infamous character; but this reason can have no application in the case of one convicted of wilful, deliberate and premeditated murder, and awaiting execution therefor. And the reason for the rule failing, the rule itself must also fail. Aside from this, the de-

fendant is imprisoned for the purpose only that he may be produced at the time set for his execution, the confinement being no part of the punishment, but simply an incident connected therewith, referable to penal administration as its primary object; and such changes may be made applicable to past as well as future offenses.

Hartung *vs.* The People, 22 N. Y., 95, 105;
Cooley's Const. Lim, Sec. 271-272.

And although the statute designates such confinement as solitary, provision is made in the same paragraph of the act in which this term is used for his "attendant, counsel, physician, a spiritual advisor of his own selection, and members of his family" to visit him in accordance with the prison regulations, the effect of which is to give the prisoner as many liberties as he would have been entitled to under the old law. So, while the imprisonment is designated as solitary, it is not so in fact, as solitary imprisonment is usually understood.

It is said in argument that under the new statute the time between the date of the sentence and the execution may be shortened, the former law providing against the court directing the execution to take place within less than fifteen days from the time of sentence; while under the new enactment, it is provided that the judge passing sentence "shall appoint and designate in the warrant of conviction a week of time within which such sentence must be executed; such week so appointed shall be not less than two nor more than four weeks from the day of passing such sentence," the particular time of execution within the week being left to be fixed by the warden of the penitentiary. If, under this act, the defendant might be hanged within less than the minimum of time from the date of passing sentence, enjoined by the former statute, we would unhesitatingly say that the law could not be made applica-

ble to his case; as to hold otherwise would be contrary to the rule forbidding a change of punishment to the disadvantage of the defendant, after the commission of the crime, and slight changes in this respect have been held sufficient to make the law *ex post facto* and void as to past offenses. Thus in Commonwealth *vs.* McDonough, 95 Mass., 581, it was decided that a law enacted after the commission of the offense of which the defendant was charged which decrease the maximum of imprisonment that might have been inflicted, and also the fine, was unconstitutional as to that offense for the reason that it fixed the minimum of imprisonment at three months; whereas, before that time, there was no minimum fixed to the Court's discretion. A careful examination of the statutes of 1889 discloses, however, the fact to be that in no event will the terms of the act permit an execution to take place thereunder within less than fifteen days from the time of sentence, as provided in the former act. In arriving at this conclusion we do not rely in the least upon the distinction which some Courts have drawn between cases where time is to be computed from an act done and those in which it is to be reckoned from a given day; holding that in a former case, the day upon which such act is performed is to be counted, and in the latter, not. (See Arnold *et al vs* The United States, 9 Cranch, 104; and also cases cited in Bouvier's law dictionary under the word "Time") We prefer to rest our decision upon something different, and, as we think, more substantial.

The command of the statute is that a week of time shall be fixed by the court within which the sentence must be executed, such week not to be less than two weeks nor more than four weeks from the day of passing sentence. We are of the opinion that the week of time so to be fixed must be held to be a calender week, *i. e.* a period of time extending from twelve, midnight, Satur-

day, until twelve, midnight, the following Saturday. By consulting lexicographers of established accuracy, this conclusion will be found to be in accordance with the primary and usual definition given to the word "week."

"Week—The period of seven days: particulary the period of seven days, commencing with Sunday."—*Worcester.*

"A period of seven days, usually that reckoned from one Sabbath or Sunday to the next."—*Webster.*

"Seven days of time. The week commences immediately after twelve o'clock on the night between Saturday and Sunday, and ends at twelve o'clock, seven days of twenty-four hours each, thereafter."—*Bouvier.*

The word was judicially construed in accordance with the foregoing definitions in the case of Ronkendorff *vs.* Taylor's Lessee 4 Pet. 361, where it is said:

"A week is a definite period of time commencing on Sunday and ending on Saturday."

It follows from this construction that while in most cases more than two full calender weeks must necessarily elapse, under the statute, between the time of sentence and the execution, in no case could such execution take place within less than fifteen days from the date of sentence. Sunday being a non juridical day, the most favorable case possible in support of the theory advanced by counsel for the prisoner—that the time could be shortened under the late act—would arise if a defendant should be sentenced upon a Saturday. For convenience we will assume that such Saturday is the first day of the month, the week of execution could in no event commence to run until the third Sunday thereafter—the 16th day of the month—which would be the earliest possible day for the sentence to be executed under the terms of the act. And the same result would follow under the former law, requiring at least fifteen days from the time of sentence to the execu-

tion; as it has been decided in this State that when time is to be computed either prior or subsequent to a day named, the usual rule is to exclude either the first or last day of the designated period and include the other. Stebbens *vs.* Anthony *et. al*, 5 Colo., 348. So, under either law in the case supposed, a sentence might be executed upon the sixteenth day for aught it appears in either act to the contrary.

We are not, on account of the illustration given, to be understood as sanctioning the execution of the death penalty upon the Sabbath day. Such a course would be highly improper, if not positively illegal. If the latter, an additional day would be gained under the new law.

In addition to the authorities hereinbefore cited, we refer to the following in support of the conclusions reached in this opinion:

Bishop Crim. Law, Sec. 280 *et. seq.*
Wharton Crim. Law, Sec. 31.
Wade on Retroactive Laws, Sec. 283.
State *vs.* Arlin, 39 N. H., 179.
Marion *vs.* State, 20 Neb., 233

It appearing that the sentence pronounced by the District Court is in accordance with the views herein expressed, the prisoner must be remanded, and it is so ordered.

Petitioner remanded.

This is the decision referred to in the petitions herein, as being adverse to petitioners. We also file herewith a certified copy thereof

Having ascertained the past and present laws in this State, we will consider wherein the law now challenged is opposed to the constitutional rights of petitioners. Some of the reasons urged against this law are founded upon purely sentimental grounds; others have more of a legal character. It is doubtless correct to say that before any

law can be declared *ex post facto*, it must be in controvertion of some *legal* right heretofore enjoyed under the guarantee of the Constitution, for it is not the policy of the law or the courts to see that a "primrose path" to the gallows is provided for those deemed worthy of the law's severest condemnation. If the prisoner secures his fair and impartial trial, and meets no more severe punishment than was provided when his crime was committed, in fact and in substance, no complaint against the law can avail. We will notice petitioners' objections in the order in which they are set out in the petitions:

1. "The execution is enclosed from public view."

It would be sufficient answer to this objection that at no time and by no law has there been any direction or command that executions shall be public. All this is left to the discretion of the sheriff, who provides the place and manner thereof. That he may have been accustomed to make executions public, in no wise deprived him of the discretion to make them private, or to restrict the number of those who may be present. Before this objection could avail, in any event, it must appear that there was a legal right to a public execution. Had the law been changed in this particular alone, of providing for private executions, leaving all else unchanged, we conceive that this ground of challenge would never have been seriously entertained. But the reasons for the change are so clearly referable to penal administration, and not to change in the punishment, that no good reason can be assigned against the law.

2. "Change of place of execution."

This is so fully answered in Carter *vs.* Burt, 12 Allen (Mass.), 424, that nothing more need be said. Besides, in Gut *vs.* State, 9 Wall, 35, affirming S. C 13 Minn, 341, this Court held that a change in the *place of trial* was not

ex post facto. It would seem that any change in the law that might affect the *result* of a trial would be much more important to the prisoner than changes affecting the proceedings subsequent to conviction, and, therefore, with much less reason can objections be urged against the latter.

3. "Change of Executioner."

All that the prisoner can demand, is that the officer, carrying out the sentence of the Court, should do so conformably to the law, with the ordinary regard for the dictates of humanity, and the particular *official title* of the executioner makes no difference to him. The statutes quoted, show that our laws are solicitous that every humane consideration should be extended to these unfortunates, and that it is the command of our laws that such proceeding shall be carried on as mercifully as can be. Suppose the office of sheriff were to be abolished, could it be said that convicted murderers had such a vested right that a particular officer should execute them, that a sheriff charged solely with the performance of these residuary duties, should be kept in office for the purpose of executing old offenders, under penalty of having our laws declared *ex post facto?*

4. "Lessens the time in which execution may take place."

This objection, if well taken, would be valid, as was conceded by our Supreme Court in the opinion hereinbefore printed, but such opinion so clearly defines the meaning of the material word therein, "week," and so clearly shows that the time is not shortened, that nothing more will be urged on that point. It will be observed that the opinion cites Ronkendorff *vs.* Taylor's Lessee, 4 Pet., 361, among other authorities sustaining it. Where particular words in a statute have received a judicial

interpretation, that meaning attaches the same as if the words had been particularly defined in the statute itself. And the construction of the laws of a State by its highest Court, established by admitted precedent, is binding upon the Courts of the United States.

Randall *vs.* Brigham, 7 Wall, 523.
Norton *vs.* Shelby Co., 118 U. S., 425 (439).
Pease *vs.* Peck, 18 How., 595.
And numerous other decisions of this Court.

Therefore the statute of 1889 should be interpreted exactly as if its words were, "shall be not less than two, nor more than four *calendar* weeks."

If this be true, the time is not shortened

5. "Change of place of imprisonment"

The authorities cited above, under the third heading, are entirely applicable here. It was held in Mason & Ford Co. *vs* Coal Co., 9 Southwestern Reporter 391 (~~bkv. and not reported~~), citing State *vs* McCauley, 15 Cal. 455, that a statute authorizing the hiring out of convicts to work for private parties, outside the penitentiary grounds, was not *ex post facto* as to prisoners serving terms prior to the law. Under the Statutes of the United States the place of confinement is no part of the judgment, *ex parte* Waterman 33 Federal 29.

87 Ky 467

This provision, as was said by our Supreme Court, *supra*, was doubtless made to secure the person of the condemned, to provide against possible escape or rescue, as well as dangers to himself pending the time till execution, and, perhaps, above all reasons, to provide against the morbid curiosity and attendant inconveniences too often allied with unseemly demonstrations and insane frenzies.

Section 1822, above quoted, expressly provides for a change in place of imprisonment, where the jail of the

county where the offense was committed is insecure, and under this statute it is the constant and uniform practice to convey condemned prisoners, or those charged with the more serious offenses, or those of a desparate character, from the primative and insecure jails of our more sparsely settled counties, to jails of greater safety.

6. "Adds travel, chained to car seat."

This need not be noticed, except to suggest that "travel" is not made part of the punishment, and occurs incidentally, if at all, and that a prisoner shall be "chained to car seat," is found nowhere except in the imagination of counsel.

7. "Substitutes strangers for acquaintances."

We do not understand what is meant by this, and see no reason for answering it.

8 "Adds solitary confinement."

To the reasons given in the above quoted opinion, *in re* Tyson, can be added that there is no provision of the old law requiring the jailer to allow visitors to see convicted prisoners, except an attorney of his choosing, the governor, judges, etc., while under the present statute his right to see all persons necessary or useful for the full protection of his interests and rights, and for the full presentation of whatever he may desire to urge, is amply guaranteed.

Repeals by implication are not favored, and, therefore, to the persons specifically named in the act of 1889, as being entitled to access to the prisoner, is to be added the governor, judges, etc., named in section 2601. His right to see and consult such persons is thus put upon a legal basis, and is not left to the mere whim and caprice of a jailer, and thereby the law has been moderated in the interest of the prisoner, rather than restricted.

9. "Access only to attendants, counsel, physician, spiritual advisor of his own selection, and members of the family."

What is said above is entirely applicable here, and nothing more will be added.

10. "Allows not even those to see him, except in accordance with prison regulations, which are strict and different from county jail regulations, or rather no regulations."

Section 2553 provides that there shall be reasonable general regulations governing the penitentiary, made by men appointed by the governor, confirmed by the Senate, and, presumably, men of the ordinary human instincts.

These regulations must not be inconsistent with law, and hence must allow the person authorized to visit the prisoner, to do so. As we have frequently said above, there was no legal duty put upon the jailors under the old law, to allow any one to visit the prisoner, except his attorney, the Governor, etc. Nor can it be said that prison regulations are more strict than could be ordinary jail regulations, because the latter regulations may extend to absolute prohibition, with certain limited exceptions. And here again it may be said, that were the old law modified so as to require the jailor to refuse access to the prisoner by all persons except those allowed in the act of 1889, the matter would be so clearly referable to prison regulations and discipline that no question could be raised thereabout.

11. "Changes the person who shall fix the day and hour of execution."

Under the old law, the exact *hour* was left to the discretion of the sheriff; with it the Court had nothing to do. In Seaborn *vs.* State, 20 Ala., 15, it was held that where the statute provided that not more than twenty

nor less than ten days should elapse between the time of sentence and execution, the statute was merely directory; and if more than twenty days are allowed, the judgment of conviction is not thereby vitiated. Bishop, in his work on statutory crimes, section 255, approves this doctrine, and cites Seaborn *vs.* State, *supra*, and English cases as authority therefor, and it was held in State *vs.* Oscar, 13 La. Ann. 297, that the time of execution is not an essential part of the judgment, and that if the Court fails to fix the time of the execution, or if the time has expired, the sheriff shall still execute the sentence, or if both the Court and sheriff fail herein, the Governor, under his constitutional duty to see that the laws be faithfully executed, may fix the time of execution. It seems that at common law the time of execution was not part of the sentence, and, possibly, that the sheriff carried out the judgment of the Court in these cases the same as he performed his duties under any other judgment. Under the ordinary rule, that statutes in derogation of the common law are to be strictly construed, the Alabama and Louisiana cases, above cited, were correctly decided, and these views are supported by Wilkerson *vs.* Utah, 99 U. S., 130.

We believe that several States have this same provision as to the executioner fixing the time, though we are not aware of any case having arisen under these statutes concerning the question whether they were *ex post facto* as to previous offenses.

There would seem to be no more reason to hold this law invalid because the discretion as to the exact day is changed from the Court to the warden, than a change of the person or body in whom discretion formerly resided, as to the punishment to be inflicted, and as to other incidents of the trial, should be considered obnoxious, and in Holt *vs.* State, 2 Tex., 363, changing discretion from the judge to the jury was held not *ex post facto*. "A new

tribunal may be erected, or new jurisdiction given to an existing Court to try past offenses, and this is not *ex post facto*." Com. *vs.* Phillips, 11 Pick., 28 (31); State *vs.* Sullivan, 14 Rich. (S. C.), 281; and modes of procedure, as argument of counsel, summoning the jury, etc., is not *ex post facto;* People *vs.* Mortimer, 46 Cal , 114. And so held in State *vs.* Arlins, 39 N. H., 179, where the law decreased the punishment and repealed the right to have counsel assigned to the prisoner, compulsory process for his witnesses, etc. Laws regulating the challenge of jurors, not *ex post facto* Stokes *vs.* People, 53 N. Y., 164; State *vs.* Ryan, 13 Minn., 370; Walston *vs.* Com., 16. B. Mon. (Ky.), 15.

The twelfth, thirteenth and fourteenth objections seem to be entirely sentimental.

It is apparent that all proper persons are entitled to visit the condemned up to the very time and hour of the execution. Whatever parting messages are to be given and whatever consolation is to be extended, have afforded for them ample opportunity. It is doubtful whether, in any instance, in the most public execution, where the freest access is given, the members of the criminal's family have stood by his side while the noose was being adjusted and the trap sprung—whether either the prisoner or his family ever can or ever did desire so unnatural a surrounding, and it should doubtless be considered the more merciful law that such possibilities should be rendered impossible. It will be observed that section 3 of the act of 1889, prohibits any persons than the ones named "to be present *at such execution*," and no prohibition is made as to the access to the prisoner of all proper persons up to the very time of the execution. Nor can the secrecy of the execution or the time thereof in any manner affect the punishment itself. All that can be claimed on this score is, that the outside world, to whom such penalties should act as a deterrent from crime, may

not have the example visited upon them in its full force. As to the prisoner, his condition is not changed. And so, under the old law, the exact hour of the execution was within the absolute discretion of the sheriff.

The same matters may be stated as to the eighteenth objection, that "no notice of the hour of execution" is given.

15. "Nor shall the newspapers publish anything except that he was duly executed according to law, when he may not have been executed according to law at all."

It is difficult to conceive how this objection affects the rights of the prisoner. Whether his execution be private or public, newspaper comments are so decidedly *ex post facto*, as to the particular occasion, that it can have not the slightest effect on the condition of the prisoner. Besides, it cannot be, and is not the policy or intent of this law, that acts of barbarism, cruelty or any other legitimate grounds of reprehension against the executioner, should forever be excluded from the cognizance of the proper tribunals, or to forbid that punishment be meted out to those guilty of unmerciful acts on so awful an occasion. Witnesses are required to be present for the purpose of seeing that the execution is entirely according to law. The inhibition is directed against the too common practice news-mongers have of parading sickening details under the disguise of enterprise.

The sixteenth and seventeenth objections do not bear upon the question.

19. "Provides for *post mortem* dissection."

The statutes of 1889 provides for no such thing. Its language, section 5, is: "Immediately after said execution a *post mortem* examination of the body of the convict shall be made by the attending physician and surgeon, and they shall enter in said book of record the nature and extent of such examination."

"*Post mortem examination* of a body (med.)—An examination made after the death of the patient"—*Webster*. Thus, in Ebos *vs* State, 34 Ark. 520, where a witness had made a superficial examination of the body, the Court said: "This was the extent of the *post mortem* examination."

Had the statute said *autopsy*, there might have been more validity in this objection, for autopsy is defined in medicine to be "dissection of a dead body, for the purpose of ascertaining the cause, seat, or nature of a disease; a *post mortem* examination."—*Webster*. Autopsy is, therefore, a *post mortem examination by dissection*. But even in that case it is doubtful whether the provision would be obnoxious, particularly in view of section 730, of our statutes above quoted.

20. "Takes away the discretion of the Court for prolonging the time of execution from sentence."

Several answers may be made to this.

First—It is true that it is not necessary that a statute should contain exact words of repeal in order to operate as a repeal of a previous statute, provided the purposes and provisions of the last statute clearly and plainly indicate that it is enacted in lieu and stead of the prior statute. Roberts *vs.* State, 2 Overton (Tenn.) 423. But the counterpart of this principle is that repeals by implication are not favored and a subsequent statute does not repeal a prior one, except to the extent that they are so irreconcilable that both cannot stand. Tested by these principles it appears that the theory underlying executions for murder in this State has been so changed as to provide for private executions, instead of public ones, and that the necessary machinery of law to effect this end has been provided. The time elapsing between sentence and execution, the penalties for the crime, and every incident of the trial and execution have remained sub-

stantially as before, except so far as was necessary to the new theory of executions. Hence the power of the Court to extend the time, granted by section 729 of our statutes, is still in the Court, unaffected by the act of 1889. Though that section provides for an extension of time by the Governor, we suggest that his power comes not from that section, but from Art. IV., section 7 of our Constitution: "The Governor shall have power to grant reprieves, commutations and pardon after conviction. * * * * *"

Second—Every Court has power to control its own judgment during the same term—State *vs.* Daugherty, 70 Iowa, 439, and cases cited, *ex parte* Lange, 18 Wall, 163. Though this last case holds that the Court can not set aside its judgment, even at the same term, where the penalty has already been suffered or entered upon, yet, where the penalty is death and the imprisonment merely incidental, it can not be said that the penalty has been entered upon short of the actual inflicting of death itself.

Third—Authorities above cited, Seaborn *vs.* State, Bishop on Stat Cr., State *vs* Oscar and Wilkerson *vs.* Utah, maintain the proposition that the statute fixing the time of execution is directory.

Fourth—The prisoner has no vested right in the problematical discretion of the Court, for an error in the exercise of which no review is provided, and which is subject to no control.

We have given what appears to us to be answers to all the objections urged against the act of 1889. For convenience of reference we will collocate such decisions of various Courts as seem to bear upon this question. Some cases have been decided upon principles, which appear to us to belong rather to the domain of casuists than to that of law.

Among these is Hartung *vs.* People, 22 N. Y. 95, which did not meet the approval of this Court (Wilkerson *vs.* Utah, 99 U. S. 130); Shepherd *vs.* People, 25 N. Y. 406; *in re* Petty, 22 Kan. 477, which follows the N. Y. cases; Ratzky *vs.* People, 29 N. Y. 124. Others have taken into consideration the estimate that mankind by common consent have placed upon the different modes of punishment. Thus, Strong *vs.* State, 1 Black. (Ind.) 193, holds that a change from whipping to imprisonment in not *ex post facto*. Herber *vs.* State, 7 Tex. 69, suggests a doubt on this same point. State *vs.* Kent, 65 N. C. 311, holds that change from whipping and imprisonment as at common law to imprisonment in State prison or county jail is not obnoxious, both being infamous.

We find plain cases, on one extreme, of *ex post facto* laws, as where less evidence was required to convict, State *vs* Johnson, 12 Minn., 476, where change was from death *or* imprisonment, to death only, Marion *vs* State, 16 Neb., 349, and 20 Neb., 236.

We find others decided upon, to our minds, doubtful grounds, the New York and Kansas cases *supra.*; and others upon exceeding narrow grounds, as where the cost of the prosecution was increased, Caldwell *vs.* State, 55 Ala., 135.

Other laws have been held not *ex post facto*, as where whipping was held a less penalty than death, State *vs.* Williams, 2 Rich., (S. C.) 418, and this accords with the common judgment of mankind, though opposed to the principles of the New York cases. But in all these instances the laws under discussion related to some constituent of the punishment and not to merely penal administration, and where the laws have so changed that the same penalty or a less one was inflicted than under the old law, though inflicted not exactly through the same machinery, these laws have been held valid.

Thus, in Helton *vs.* Miller, 14 Ind., 577, held that working convicts outside the walls of the penitentiary should be regarded as a mitigation rather than otherwise, Mason & Ford Co. *vs.* Coal Co., *supra.*, and even where the sentence was imprisonment simply, the court may order the sentence to be carried out in a penitentiary where labor is exacted from the convicts *as part of the discipline of the prison. Ex parte* Karstendick, 93 U. S., 396.

Shaw, C. J., said in Jacquins *vs.* Com., 9 Cush., 279, that the great object of the penal laws was to deter men from the commission of crime, and the special objection to an *ex post facto* law, was, that it missed this primary object. In harmony with this is the view of all Courts, that where the substantial penalty remained the same, the procedure by which the penalty was inflicted might be changed as the judgment of succeeding ages considered best.

Doubtless there might be instances where a change in the punishment from imprisonment in a county jail to imprisonment in the penitentiary, would be *ex post facto*, the latter punishment being for an infamous crime. Mackin *vs.* United States, 117 U. S. 348; Parkinson *vs* United States, 121 U. S., 281; State *vs.* Hord, 8 S. C., 84; but where, as in this case, where the crime is infamous to the last degree, no additional punishment or infamy attaches, because it must be expiated in the penitentiary instead of the common jail.

But should the Court consider the law of 1889 *ex post facto*, as to these petitioners, they should be considered as never having been in jeopardy, and they can be recommitted to the custody of the sheriff to be proceeded with

under the same indictments for manslaughter or other offense less than murder.

Packer *vs* People, 8 Colo, 361.
Garvey's Case, 7 Colo., 384.

Respectfully submitted,

Jno W. James

Attorney General of the State of Colorado.

H. RIDDELL,
Of Counsel.

W M Stell
for Respondent

IN THE

SUPREME COURT

OF THE

UNITED STATES.

IN THE MATTER OF THE APPLICATION OF JAMES J. MEDLEY FOR A WRIT OF HABEAS CORPUS.

IN THE MATTER OF THE APPLICATION OF JAMES H. SAVAGE FOR A WRIT OF HABEAS CORPUS.

BRIEF OF RESPONDENT.

SAM W. JONES,
Attorney General,
H. RIDDELL,
Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

IN THE MATTER OF THE APPLICATION OF JAMES J. MEDLEY FOR A WRIT OF *Habeas Corpus.*

IN THE MATTER OF THE APPLICATION OF JAMES H. SAVAGE FOR A WRIT OF *Habeas Corpus.*

A. T. BRITTON,
HENRY WISE GARNETT.
W. V. R. BERRY,
Of Counsel for Petitioners.

JUDD & DETWEILER, PRINTERS.

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IN THE MATTER OF THE APPLICATION OF JAMES J. MEDLEY FOR A WRIT OF *Habeas Corpus.*

IN THE MATTER OF THE APPLICATION OF JAMES H. SAVAGE FOR A WRIT OF *Habeas Corpus.*

UNITED STATES OF AMERICA, }
State of Colorado, County of Arapahoe, } *ss:*

BRIEF.

This is an application for a writ of *habeas corpus* on the ground that the petitioners are unlawfully and without authority of law confined at Cañon City in the State penitentiary of the State of Colorado.

The illegality of the said confinement of the petitioners is based on the following facts:

That the law under which the petitioners were sentenced became such after the commission of the alleged crimes, and inflicts a greater punishment than the law in force at the time of their commission, and changes and alters the situation of the petitioners to their disadvantage, and such law is therefore an *ex post facto* law, and is unconstitutional and void.

The statute of the State of Colorado in question and all necessary facts relative to the case have been set out in detail in the brief already filed. We desire briefly to supplement that brief.

I.

WHAT IS AN EX POST FACTO LAW?

In Calder *vs.* Bull, 3 Dallas, 390, Judge Chase says:

"*Third.* Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed."

In Fletcher *vs.* Peck, 6 Cranch., 87, Marshall, J., defines an *ex post facto* law to be one "which renders an act punishable in a manner in which it was not punishable when it was committed."

In Kring *vs.* Missouri, 107 U. S., 221, it is held that—

"Within the meaning of the Constitution any law is *ex post facto* which is executed after the offense was committed, and which, in relation to it or its consequences, *alters the situation of the accused to his disadvantage.*"

In this case Miller, J., delivering the opinion of the Court (p. 235), says:

"We are of opinion that any law passed after the commission of an offense which, in the language of Mr. Justice Washington, in United States *vs.* Hall, 'in relation to that offense or its consequences, *alters the situation of a party to his disadvantage,*' is an *ex post facto* law; and in the language of Denio, J., in Hartung *vs.* The People, 'No one can be criminally punished in this country except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed AND WHICH EXISTED AS A LAW AT THE TIME.'"

In Cummings *vs.* Missouri, 4 Wall., 320, this Court uses the following language:

"An *ex post facto* law is one which imposes additional punishment to that then prescribed."

"We do not agree with the counsel of Missouri that 'to punish one is to deprive him of life, liberty, or property, and that to take from him *anything less than these is no punishment at all.*' The learned counsel does not use these terms—life, liberty, and property—as comprehending every right known to the law. He does not include under liberty *freedom from outrage on the feelings as well as restraints on the person.*"

In Shepherd *vs.* The People, 25 N. Y., 416, the court says:

"If you depart from the principle that a law is *ex post facto* because it punishes the offense in a different manner or by a different kind of punishment than it was punishable with when committed, the question whether the law is *ex post facto* is left to judicial discretion; for a decision of the question must depend upon the opinion of judges as to whether the new punishment is more severe than the old, or whether the new punishment would or would not generally be preferred by criminals to the old. *The construction of constitutional limitations should be left as little as possible to either legislative or judicial discretion.*"

"PUNISHMENT: *Any* pain or suffering inflicted on a person because of a crime or offense."—*Webster's Dictionary.*

Anderson, in his new "Dictionary of Law" (1889), says:

"In *ex post facto* laws '*punishment*' is synonymous with chastisement, correction, loss, or suffering to the party supposed to be punished, and not only in the legal sense, which signifies a penalty inflicted for the commission of crime."

See heading: Punishment.

The theory of an *ex post facto* law seems to rest upon this principle, that if every individual is bound to society, society is not less bound to every individual by a contract which is

necessarily obligatory on both sides; or, as Blackstone has it (4 Com., *8):

"The lawfulnsss, therefore, of punishing such criminals is founded upon this principle, that the law by which they suffer was made by their own consent; it is part of the original contract into which they entered when first they engaged in society; it was calculated for, and has long contributed to, their own security. This right, therefore, being thus conferred by universal consent, gives to the State exactly the same power, *and no more*, over all its members as each individual member has naturally over himself or others."

It is admitted in the cases at bar that the act of 1889 did not become a law until after the commission of the offenses. It is therefore clear under this principle that the law by which these parties were condemned and suffer was not made with their consent, it is not part of the contract into which they entered, and as regards them it is void if *in the slightest degree* it alters their situation to their disadvantage, and this is so even though the effect be to leave *no* law by which the parties could be punished.

The simple questions in this case, then, are: Does the law of 1889 alter the situation of these parties to their disadvantage? Does it change the punishment and inflict a greater punishment than the law annexed to the crime when committed? Does it render an act punishable in a manner in which it was not punishable when committed? In other words, does it inflict in *any* degree greater punishment, pain, or privation than the act in force at the time the offenses were committed?

As has been stated in the brief already filed, the law of 1889 inflicts a greater punishment in at least six respects:

1st. It adds solitary confinement.

2d. It makes it possible that the sentence shall be executed within a shorter time.

3rd. The relatives and friends of the condemned cannot visit him.

4th. It adds the *uncertainty* as to when the sentence will be executed.

5th. It takes from the court *discretion* to prolong the time within which the sentence shall be executed.

6th. It adds the terrors of a *post mortem* examination.

I.

SOLITARY CONFINEMENT.

The act of 1889 directs (sec. 2) that after the convicted person shall be delivered to the warden, the latter "shall keep such convicts in solitary confinement until infliction of the death penalty." No such provision appears in the act of 1883, which was in force at the time the offenses were committed.

It is plain from an examination of the statutes of England that solitary confinement was a punishment distinctly inflicted as a "further terror," and meant to be a peculiar hardship and pain to the condemned as well as to prevent the perpetration of certain crimes. By statute 25 Geo. II, C. 37, entitled "An act for better preventing the horrid crime of murder," it is enacted that—

"Whereas the horrid crime of murder has of late been more frequently perpetrated than formerly; and whereas it is thereby become necessary that some *further terror* and peculiar mark of infamy be added to the punishment of death, now by law inflicted on such as shall be guilty of the said heinous offense:

"VI. *And be it further enacted by the authority aforesaid*, That from and after such conviction and judgment given thereupon the gaoler or keeper to whom such criminal shall be delivered for safe custody shall confine such prisoner to some cell separate and apart from the other prisoners, and

that no person or persons whatsoever, except the gaoler or keeper or his servants, shall have access to any such prisoner, without license being first obtained."

Previous to this act of Geo. II parties condemned to death for murder were confined until execution in the common gaol, in the society of their fellow-prisoners. The preamble of the act states in unmistakable terms that a further punishment is necessary for the prevention of murder, and thereupon, as an additional punishment, inflicts the pain of solitary confinement.

The provisions of the act of Geo. II were re-enacted by statute 9 Geo. IV, C. 31, but by statute 6 and 7 Will. IV, C. 30, the additional punishment of solitary confinement, as inflicted by the former statutes, was repealed as follows:

"Whereas, by an act passed in the ninth year of the reign of his late majesty King George the Fourth, it was, amongst other things, provided that 'every person convicted of murder should, after judgment, be fed with bread and water only, and that no person but the gaoler and his servants and the chaplain and surgeon of the prison should have access to any said convict without the permission in writing of the court or judge before whom said convict should have been tried:'

Be it therefore enacted, That so much of the said acts of the ninth and tenth years, respectively, of the reign of his late majesty King George the Fourth as is hereinbefore recited shall be, and the same is hereby, repealed.

"2. *And be it further enacted*, That from and after the passage of this act sentence of death may be pronounced after convictions for murder in the same manner, and the judge shall have the same power in all respects as after convictions for other capital offenses."

6 and 7 William IV, C. 30.

That is to say, without powers to inflict the additional punishment of solitary confinement.

But the act of 1889 of Colorado, in relation to solitary confinement, is more severe even than the act of George II. By

the latter, the judge may relax the severity of the statute in this regard and grant a license to any one to visit the prisoner. By the former "*no person* shall be allowed access to said convict except his attendants, counsel, physician, a spiritual adviser of his own selection, and members of his family, and then only in accordance with prison regulations."

Now if, as often happens, the criminal has no family, no religious ties, his solitary confinement becomes absolute. Besides, the act of 1889 also provides that within twenty-four hours from the time of sentence the convicted man shall be removed from the place of trial to the State penitentiary, and even if he has a family, counsel, or spiritual adviser they might have neither means nor power to follow, and, again, the solitary confinement would be absolute, with no power in judge, jailer, or in any one else to relax it.

Can any one say that this would not be an additional punishment, the infliction of pain or privation, the alteration of his situation to his disadvantage? It might depend upon the temperament of the convict, perhaps; but, as Denio, J., says (Hartung *vs.* People, 22 N. Y., 106) in regard to what might be most severe in two given cases: "That would depend upon the disposition and temperament of the convict. *The Legislature cannot thus experiment upon the criminal law.* * * * It is enough, in my opinion, that it changes it *in any manner* except by dispensing with divisible portions of it."

The statutes of England enacting that solitary confinement be inflicted for punishment of crime are so numerous that only a few need be pointed out. It seems clear from these statutes that no court can inflict the additional punishment of solitary confinement without statutory authority. By act 24 and 25 Vict., C. 99, entitled, Of Counterfeiting Coin, the words "with or without solitary confinement" are introduced in every section, and finally by section 40, even this is limited as follows:

"SEC. 40. Whenever solitary confinement *may* be awarded for any offense under this act, the court may direct the offender to be kept in solitary confinement for any portion or portions of his imprisonment, * * * not exceeding one month at any one time and not exceeding three months in any one year."

1 Russell on Crimes, 104:

See also 24 and 25 Vict., C. 100, On Destroying Infants in the Mother's Womb.

Section 58 of this act punishes "with or without solitary confinement," and by section 70—

"Whenever solitary confinement *may* be awarded for any offense under this act, the court may direct the offender to be kept in solitary confinement for any portion or portions of any imprisonment which the court may award, not exceeding one month at any time, and not exceeding three months in any one year; and whenever whipping may be awarded for any offense under this act, the court may sentence the offender to be once privately whipped."

Would it for a moment be said that whipping was not an additional punishment? And yet in this act, whipping and solitary confinement are named and inflicted, and their use restricted in the same way.

See also 2 Russell on Crimes, * 67, quoting from the present "Larceny Act."

Here solitary confinement and whipping are inflicted and limited by the same section of the act (sec. 119).

Also 2 Russell on Crimes, * 849, quoting from the present Forgery Act.

Also 2 Russell on Crimes, * 1022, quoting from the present Malicious Injuries Act.

Here solitary confinement and whipping are again inflicted and restricted by the same section (sec. 75).

And many others, and in all cases where the punishment of solitary confinement is enacted, the statute, knowing the severity of such punishment, restricts it to one month, and

never for more than three months, in any year. Such statutes show clearly that the law-makers of England distinctly recognize solitary confinement not only as a punishment, but as a severe one, and inflicted only in special cases, and then with restrictions.

Authorities on the subject of Penology are unanimous in calling solitary confinement a punishment of the severest character.

Larousse, in the "Dictionnaire Universel," in the well-known article on PRISONS, states certain punishments inflicted by French law.

Among others, he says, are:

(3.) Solitary reclusion; and adds, that this punishment is "une peine très-rigoureuse," and in all cases it is limited to one month.

The article entitled Prisons, in the Encyclopedia Britannica, sums up the laws of the different States of Europe on the same subject.

In England the theory of solitary confinement, as a general punishment, at one time obtained and was in force for a time at Millbank Prison. Its use lasted for only a short time, "as experience showed that it was impossible for a man to resist for any time the horror of solitary confinement."

Speaking of the old cell-system at Auburn, N. Y., of solitary confinement, Bonnet says:

"At Auburn several prisoners died, many became insane, and the authorities, frightened at such a barbarous system, were forced to repeal it." (See Larousse, Prisons.)

In the above-quoted article on Prisons in the Encyclopedia Britannica, the author, Arthur Griffiths, for many years governor of Millbank Prison, says:

"The sentence of penal servitude consists of three distinct periods or stages: (1.) That of probation endured in separate confinement at a so-called 'close' prison—this period of almost unbroken solitude—is one of *severely penal character*."

Speaking of the same subject in Belgium, he says:

"The prisoner lives in association with the prison staff, not with his fellow-criminals. * * * The Belgian authorities insist that the dread of the *punishment* has had a marked effect."

In all cases where prisoners have been condemned to this solitary confinement the sentences have been shortened, for "as the treatment was more severe, justice demanded a curtailment of the penalties."

Speaking of Russia, he says the law there is that "prison offenses are punished by relegation to a solitary cell."

By a law of Austria of April 1, 1872, where prisoners are condemned to solitary confinement "it is provided that two days of solitary confinement passed in a cell are to be reckoned as three in the term of sentence." Isolated confinement is the second of the three severest penalties. (See American Cyclopedia—article, Prisons.)

From these facts it is evident that solitary confinement has always been, and still is, considered a most rigorous penalty and punishment. In the old statutes it is distinctly called a "further terror," necessary to be inflicted in addition to the death penalty, in order to prevent murder. It was never inflicted without distinct statutory authority, and where so inflicted in the present English statutes its use is always restricted. This same view obtains in most of the States of Europe, where it is often called a "peine très-rigoureuse" and other terms to the same effect.

The infliction of solitary confinement enacted by the Colorado statute of 1889 is clearly an additional punishment. This statute changes the punishment, and inflicts a greater one than the law annexed to the crime when committed. It alters the situation of the accused to his disadvantage, and is therefore *ex post facto* and void.

II.

SHORTENING THE TIME WITHIN WHICH THE SENTENCE MAY BE EXECUTED.

By the terms of the law of 1883 the punishment of death shall be "at such time as the court shall direct, *not less than* FIFTEEN nor more than twenty-five days from the time sentence is pronounced."

By the law of 1889 it is enacted "the judge passing such sentence shall appoint and designate in the warrant of conviction a week of time within which such sentence must be executed; such week so appointed *shall not be less than* TWO nor more than four weeks from the day of passing such sentence."

It is apparent that under the law of 1889 the life of the condemned *may be shortened by one day.*

If the law alters the situation of the party to his disadvantage *in the slightest degree*, or if, in the words of Mr. Justice Miller in Kring *vs.* Missouri, there is a "*slight variance,*" it is *ex post facto* and void. This is a fundamental principle which should not be violated.

In Commonwealth *vs.* McDonough (95 Mass., 581) the court says:

"Though it is desirable that all offenders against our penal laws should be punished, yet it is better that one should occasionally escape than that the fundamental principles of the criminal law should be violated."

Quoted and approved in Garvey *vs.* People, 6 Col., 571.

III.

THE RELATIVES AND FRIENDS OF THE CONDEMNED CANNOT VISIT HIM.

This point has been fully dwelt upon under the head of solitary confinement. By the act of 1889, within twenty-

four hours after conviction the condemned must be taken to the State penitentiary, which may be hundreds of miles from the county wherein such conviction is had. This removes him far from family and friends. The act next bars from him his friends and *all persons*, except members of his family. If he has no family, or they cannot come to him, in consequence of this removal ordered by the act, his solitary confinement becomes absolute.

IV.

IT ADDS THE UNCERTAINTY AS TO WHEN THE SENTENCE WILL BE EXECUTED.

The statute of 1889 enacts that—

"The time fixed by the said warden for said execution shall be by him kept secret, and *in no manner* divulged, except privately, to the persons by him invited to be present as aforesaid."

By this provision the condemned is left in uncertainty as to the time of execution until the last moment comes. This is the method in use in France, and the horror of it to the condemned has been described by a score of writers. In the article entitled "*Exécution Capitale*" (Larousse: Dictionnaire Universel) Maxime du Camp, who has made special study of executions, describes graphically the terrible tension that this uncertainty brings to bear on the condemned. He is "sleepless, unquiet, restless, suspicious of everything." Every minute may be his last.

By a statute of Kansas a convicted murderer, after one year's hard labor, is hanged, but no day fixed. Speaking of the mental condition of the prisoner after the expiration of this year of labor, the court in *In re* Petty, 22 Kansas, 482, says: top of page 337

"Under the act every moment of the prison life of the convict, * * * like the alleged lot of Damocles, is em-

bittered by the dread of impending death. The sword is indefinitely suspended over his head, ready to fall at any time."

This uncertainty prescribed by the statute of 1889 is an additional punishment of the severest kind, and renders the act clearly *ex post facto* and void.

V.

IT REMOVES ABSOLUTELY FROM THE COURT ANY AND ALL DISCRETION TO PROLONG THE TIME WITHIN WHICH THE SENTENCE SHALL BE EXECUTED.

Under the law of 1883 the court was authorized to prolong the time of execution indefinitely. The law of 1889 does away with this discretion absolutely and directs that execution must take place within four weeks.

In King *vs.* Missouri, 107 U. S., 230, Miller, J., delivering the opinion of the court, says:

"In Commonwealth *vs.* McDonough, 13 Allen, 581, it was held that a law passed after the commission of the offense of which the defendant stood charged, which mitigated the punishment, as regards the fine and the maximum of imprisonment that might be inflicted, was an *ex post facto* law as to that case, because the minimum of imprisonment was made three months, *whereas before there was no minimum limit to the court's discretion.* This slight variance in the law was held to make it *ex post facto* and void as to that case, though the effect of the decision was to leave no law by which the defendant could be punished, and he was discharged, though found guilty of the offense."

By the law of 1883 the time of execution might be prolonged indefinitely by the court for good cause. Such discretion has always existed in the English courts. (See Rex *vs.* Hensey, I Burr., 650.) The removal of all such discretion by the act of 1889 clearly alters the situation of the parties to their disadvantage and renders such act *ex post facto.*

VI.

DISSECTION.

The statute of 1889 enacts that "immediately after said execution a *post-mortem* examination of the body of the convict shall be made by the attending physician and surgeon."

From the earliest times until to-day the thought of involuntary dissection after death has been and still is one of terror to many and of repulsion to all, and clearly comes within the language "outrage on the feelings," which Field, J., in Cummings *vs.* Missouri (4 Wall., 320), holds to be *punishment* within the meaning of an *ex post facto* law.

In the early history of English law we find dissection after death superadded by statute as a punishment only to the most heinous crimes. Blackstone never mentions it without some accompanying word of "terror," "pain," or "disgrace."

In his Commentaries (IV, * 18) he says: "And in England, besides the *additional terrors* of a speedy execution and a subsequent exposure or *dissection*, robbers have a hope of transportation, which is seldom extended to murderers. This has the same effect here as in China in preventing frequent assassination and slaughter."

That any outrage to a dead body is a punishment is clearly set down by Blackstone. In his Commentaries (IV, * 190) he says: "What *punishment* can human laws inflict on one who has withdrawn himself from their reach? They can only act upon what he has left behind him—as by an ignominious burial in the highway, with a stake driven through his body."

Speaking of "judgment" and additional punishment, he says (Com., IV, * 376): "Of these some capital, which extend to the life of the offender, and consists generally in being hanged by the neck until dead, *though in very atrocious*

*crimes, other circumstances of terror, pain, or disgrace are superadded, * * * as, in murder, a public dissection.*"

According to the laws of England the body of a criminal could not be dissected except when it was so authorized by statute, and this additional punishment was considered so severe that it was inflicted only for the prevention of the most atrocious crimes. By statute 25 George II, C. 37, entitled "An act for preventing the horrid crime of murder," it was enacted:

"That whereas the horrid crime of murder has been of late more frequently perpetrated than formerly; * * * and whereas it is thereby become necessary that some *further terror and peculiar mark of infamy be added to the punishment of death*, now by law inflicted:

"*Be it enacted by the authority aforesaid*, That the body of such murderer so convicted shall be * * * delivered to the company of surgeons, and shall be dissected and anatomized by the said surgeons or such persons as they shall appoint."

This statute was re-enacted by statute 9 George IV, C. 31, entitled "An act for consolidating the statutes of England."

These acts continued in force until 1832. In that year the crimes of the well-known Burke and his associates, who murdered many persons for the purpose of selling their bodies to surgeons, created such an intense excitement throughout all England and such a horror of the practice of dissection, that the statute 2 and 3 William IV, C. 75, was enacted. By section XVI of this statute it is enacted:

"And whereas an act was passed in the ninth year of the reign of his late majesty, for consolidating and amending the statutes of England relative to offenses against the person, by which latter act it is enacted 'that the body of every person convicted of murder shall, after execution, *either be dissected* or hung in chains, as to the court which tried the offender shall seem meet; and that the sentence to be pronounced by the court shall express that the body of the

offender *shall be dissected* or hung in chains, whichsoever of the two the court shall order:'

"*Be it enacted*, That so much of the last-recited act as authorizes the court, if it shall see fit, *to direct that the body of a person convicted of murder shall, after execution, be dissected, be, and the same is hereby, repealed.*"

By this same section the court, if it sees fit, is still authorized to condemn the body to be hung in chains, showing that, of the two, the hanging in chains was considered the lesser punishment.

This repealing act shows conclusively that authority to inflict the additional penalty of dissection after death, existed only by statutory enactment; and the old acts ordering this "further terror" of dissection having been repealed, there is to-day no power in the English courts to inflict it.

This wide-spread and instinctive horror of any act tending toward the desecration, mutilation, or dissection of the human body after death is too well recognized to be dwelt upon. Such a feeling is often bound up with religious belief, in men's most sacred hopes—for many believe, and on biblical authority, that mutilation of the body on earth means mutilation throughout eternity. It is one of man's most natural rights that his body shall remain inviolate, and dissection is a most grievous "outrage on the feelings," "a peculiar mark of ignominy," the keenest "additional terror" to any man, and especially to an ignorant criminal, whose mind has already been sensitized and haunted by the "horror of solitary confinement." This natural right no State can abridge, no court can take away, without the consent of the criminal, and this implied consent cannot be extorted by a law passed after the commission of the crime, and inflicting a punishment which did not exist at the time the crime was commited.

That dissection is a *punishment* under the definition of an *ex post facto* law there can be not the slightest doubt. The

statute of 1889 inflicting such additional punishment is *ex post facto* and void.

It being manifest that the act of 1889 renders an act punishable in a manner in which it was not punishable when committee, that it inflicts a greater punishment than the law annexed to the crime when committed, that it alters the situation of the accused to their disadvantage, the said act is *ex post facto* and void, and the prisoners should be discharged.

Hartung *vs.* People, 22 N. Y., 95.
Commonwealth *vs.* McDonough, 95 Mass., 581.
Shepherd *vs.* People, 25 N. Y., 406.
Hirschburg *vs.* People, 6 Col., 145.

Respectfully submitted,

A. T. Britton,
Henry Wise Garnett.
W. V. R. Berry,
Of Counsel for Petitioners.

Office Supreme Court U. S.
FILED.
DEC 16 1889
JAMES. H. McKENNEY.
CLERK.

IN

The Supreme Court

OF THE

United States.

IN THE MATTER
OF THE
APPLICATION OF JAMES J. MEDLEY FOR A WRIT OF HABEAS CORPUS.

IN THE MATTER
OF THE
APPLICATION OF JAMES H. SAVAGE FOR A WRIT OF HABEAS CORPUS.

UNITED STATES OF AMERICA,
State of Colorado,
COUNTY OF ARAPAHOE. } *ss.*

BRIEF.

ROBERT W. BONYNGE,
Counsel for Petitioner Medley.
MORRIS, TEBBETTS & STOWELL,
Counsel for Petitioner Savage.

Of Counsel.

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Now comes the petitioner, James J. Medley, by his counsel, and moves this Honorable Court for leave to file a petition praying that a writ of habeas corpus may issue from this Court, and submits threon the accompanying brief.

It appearing that the said petitioner is now under sentence of death, and his counsel being advised that execution of such sentence is fixed for some day in the fourth week of [illegible]

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Now comes the petitioner, James J. Medley, by his counsel, and moves this Honorable Court for leave to file a petition praying that a writ of habeas corpus may issue from this Court, and submits threon the accompanying brief.

It appearing that the said petitioner is now under sentence of death, and his counsel being advised that execution of such sentence is fixed for some day in the fourth week of the month of December instant, the speedy action of this Honorable Court in the premises is earnestly prayed.

Respectfully submitted,
ROBERT W. BONYNGE,
Counsel for Petitioner.

A. T. Britton
Henry Hise Garnett
of Counsel

IN

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H. SAVAGE FOR A WRIT
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UNITED STATES OF AMERICA,
State of Colorado,
COUNTY OF ARAPAHOE. } *ss.*

Now comes the petitioner, James H. Savage, by his counsel, and moves this Honorable Court for leave to file a petition praying that a writ of habeas corpus may issue from this Court and submits thereon the accompanying brief.

It appearing that the said petitioner is now under sentence of death, and his counsel being advised that execution of such sentence is fixed for some day in the fourth week of the month of December instant, the speedy action of this Honorable Court in the premises is earnestly prayed.

Respectfully submitted,

MORRIS, TEBBETTS & STOWELL,
Counsel for Petitioner.

A. J. Britton
Henry Wise Garnett
of Counsel

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UNITED STATES OF AMERICA,
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BRIEF.

This is an application for a writ of habeas corpus on the ground that the petitioner is unlawfully, and without authority of law, confined at Cañon City in the State Penitentiary of the State of Colorado.

The illegality of the said confinement of the petitioner is based on the following facts: That the law under which the petitioner was sentenced was passed after the commission of the alleged crime, and inflicts a greater punishment than the law in force at the time of the commission of the crime, and changes and alters the situation of the petitioner to his disadvantage, and is therefore an *ex post facto* law, and unconstitutional.

The law in force at the time of the commission of the crime is found in the General Statutes of the State of Colorado, 1883, page 297, Section 21, which provides, among other things, as follows:

"Every person convicted of murder of the first degree "shall suffer death, and every person convicted of murder "of the second degree shall suffer imprisonment in the pen- "itentiary for a term not less than ten years, and which may "extend to life."

Also at page 301 of the General Statutes of the State of Colorado, Section 41, which is as follows:

"The manner of inflicting the punishment of death shall "be by hanging the person convicted by the neck until "death, at such time as the Court shall direct, not less than "fifteen nor more than twenty-five days from the time sen- "tence is pronounced, unless for good cause the Court or "Governor may prolong the time."

The law under which the petitioner was sentenced is found in the Session Laws of the State of Colorado, 1889, at Page 118, and is as follows:

"An Act Relative to the Time, Place and Manner of "Infliction of the Death Penalty, and to Provide Means for "the Infliction of such Penalty; and Making it a Misde- "meanor, Punishable by Fine or Imprisonment, to Disclose "or Publish Proceedings in Relation Thereto.

"Be it enacted by the General Assembly of the State "of Colorado: Section 1. The Commissioners of the State "Penitentiary, at the expense of the State of Colorado, shall "provide a suitable room or place enclosed from public view "within the walls of the penitentiary, and therein erect and

"construct, and at all times have in preparation, all necessary "scaffolding, drops and appliances requisite for carrying into "execution the death penalty; and the punishment of death "must, in each and every case of death sentence pronounced "in this State, be inflicted by the Warden of the said State "Penitentiary in the room or place and with the appliances "provided as aforesaid, by hanging such convict by the neck "until he shall be dead.

"Sec. 2. Whenever a person convicted of a crime, "the punishment whereof is death, and such convicted per- "son be sentenced to suffer the penalty of death, the judge "passing such sentence shall appoint and designate in the "warrant of conviction a week of time within which such "sentence must be executed; such week, so appointed, "shall be not less than two nor more than four weeks from "the day of passing such sentence. Said warrant shall be "directed to the Warden of the State Penitentiary of this "State, commanding said Warden to do execution of the "sentence imposed as aforesaid, upon some day within the "week of time designated in said warrant, and shall "be delivered to the Sheriff of the county wherein such "conviction is had, who shall within twenty-four hours "thereafter proceed to the said penitentiary and deliver such "convicted person, together with the warrant as aforesaid, "to the said Warden, who shall keep such convict in soli- "tary confinement until infliction of the death penalty; and "no person shall be allowed access to said convict, except "his attendants, counsel, physician, a spiritual adviser of his "own selection, and members of his family, and then only "in accordance with prison regulations.

"Sec. 3. The particular day and hour of the execu- "tion of said sentence, within the week specified in said "warrant, shall be fixed by said Warden; and he shall in- "vite to be present thereat the Sheriff of the county wherein "the conviction was had, the chaplain and physician of the "penitentiary, one practicing surgeon resident in the State, "the spiritual adviser of the convict, if any, and six repu- "table citizens of the State of full age. Said Warden may "also appoint three deputies or guards to assist him in exe- "cuting said sentence, and said Warden shall permit no "person or persons to be present at such execution "except those provided for in this section. The time "fixed by said Warden for said execution shall be by him

"kept secret and in no manner divulged, except privately to "the persons by him invited to be present as aforesaid; and "such persons so invited shall not divulge such invitation "to any person or persons whomsoever nor in any manner "disclose the time of such execution. All persons present "at such execution shall keep whatever may transpire "thereat secret and inviolate, save and except the facts cer- "tified to by them as hereinafter provided. No account of "the details of any such execution, beyond the statement of "the fact that such convict was on the day in question duly "executed according to law at the State Penitentiary, shall "in any manner be published in this State.

"Sec. 4. Upon receiving notice from said Warden "of such execution, it shall be the duty of said Sheriff to "be present and witness such execution; and shall receive "and cause the certified transcript of record of said execu- "tion, hereinafter specified, to be filed within ten days after "said execution, in the office of the Clerk of the Court in "which said conviction was had; and the said Clerk shall "record said transcript at length in the records of the said "case. In case of the disability, from illness, or other suffi- "cient cause, of said Warden or said Sheriff to be present "at such execution, it shall be the duty of their respective "deputies, acting in their place and stead, to execute said "warrant, and to perform all other duties in connection "therewith and by this act imposed upon their principals.

"Sec. 5. Said Warden shall keep a book of record, "to be known as record of executions, in which shall be "entered at length the reports hereinafter specified. Imme- "diately after said execution a *post mortem* examination "of the body of the convict shall be made by the attending "physician and surgeon, and they shall enter in said book "of record the nature and extent of such examination, and "sign and certify to the same. Said Warden shall also "immediately make and enter in said book a report setting "forth the time of such execution, and that the convict "(naming him) was then and there executed in conformity "to the sentence specified in the warrant of the Court "(naming such Court) to him directed, and in accordance "with the provisions of this act, and shall insert in said "report the names of all the persons who were present and "witnessed said execution, and shall procure each and "every of such persons to sign said report with their full

"name and place of residence before leaving the place of "execution; and said Warden shall thereupon attach his "certificate to said report, certifying to the truth and cor- "rectness thereof, and shall immediately deliver a certified "transcript of said record entry to said Sheriff.

"Sec. 6. Any person who shall violate or omit to "comply with Sec. 3 of this act shall be guilty of a misde- "meanor, and upon conviction thereof be punished by a fine "of not less than $50 nor more than $500, or by imprison- "ment in the county jail for not less than thirty days nor "more than six months.

"Sec. 7. The Warden, or other person acting in his "stead who performs the duties imposed upon him by this "act, shall be paid for his services out of the moneys pro- "vided for the maintenance of said State Penitentiary the "sum of fifty (50) dollars; and the said sheriff shall be "paid for his services by the county where such conviction "was had the sum of 25 dollars, together with his mileage "fees as provided by law.

"Sec. 8. All acts and parts of acts inconsistent with "the provisions of this act are hereby repealed.

"Approved April 19, 1889."

Section 19 of Article V, of the Constitution of the State of Colorado, as amended November 4, 1884, is as follows:

"No Act of the General Assembly shall take effect "until ninety days after its passage, unless in case of emer- "gency (which shall be expressed in the preamble or body "of the act) the General Assembly shall, by vote of two- "thirds of all the members elected to each house, otherwise "direct. No bill except the general appropriation for the "expenses of the government only, introduced in either "house of the General Assembly after the first thirty days "of the session shall become a law."

So that the said Act of 1889 did not become a law until the nineteenth day of July, 1889.

The crime for which James J. Medley was indicted, and under which he was found guilty and sentenced, was committed on May 13, 1889, and the crime for which James H. Savage was indicted, and under which he was found guilty and sentenced, was committed on June 24, 1889.

Article I, Section 9, of the United States Constitution is as follows:

"No bill of attainder or *ex post facto* law shall be "passed."

Article I, Section 10, of the United States Constitution provides:

"No State * * * shall pass any bill of attainder or *ex post facto* law."

WHAT IS AN EX POST FACTO LAW?

In Calder vs. Bull, 3 Dallas, 390, Judge Chase says:

"I will state what laws I consider *ex post facto* laws, within the words and intent of the prohibition:

"*First*—Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action.

"*Second*—Every law that aggravates a crime, or makes it greater than it was when committed.

"*Third*—Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed.

"*Fourth*—Every law that alters the legal rules of evidence, or receives less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender."

In United States vs. Hall, 2 Wash., 373, is the following definition:

"An *ex post facto* law is one which in its operation makes that criminal or penal which was not so at the time the action was performed, or which increases the punishment; or, in short, which in relation to the offence, or its consequences, alters the situation of the party to his disadvantage."

In Fletcher vs. Peck, 6 Cranch, 87, Judge Marshall defined an *ex post facto* law to be one "which renders an act punishable in a manner in which it was not punishable when it was committed."

In Kring vs. Missouri, 107 U. S., 221, it was held that within the meaning of the Constitution, any law is *ex post*

facto which is enacted after the offence was committed, and which in relation to it or its consequences alters the situation of the accused to his disadvantage.

Ratsky vs. People, 29 N. Y., 124.
Dickinson vs. Dickinson, 3 Murphy (N. C.), 327.
Ex parte Bethurum, 66 Mo., 295.
Murray vs. State, 1 Tex. App., 417.
Dawson vs. State, 6 Tex., 347.
Boston vs. Cummins, 16 Ga., 102.
Davis vs. Ballard, 1 J. J. Marsh. (Ky.), 562.

IS THE LAW OF 1889 AN EX POST FACTO LAW?

The law of 1889 is an *ex post facto* law because it was passed after the commission of the alleged crime, and changes the punishment and inflicts a greater punishment than the law of 1883, which was the law in force at the time of the commission of the crime, in the following respects, to-wit: (1) It adds solitary confinement to the punishment. (2) It makes it possible that the sentence shall be executed within a shorter time than under the law of 1883. (3) The petitioner's relatives and friends, not members of his family, cannot visit him. (4) It adds to the terror of death the uncertainty as to when the sentence will be executed. (5) It renders his death certain within four weeks from the date of sentence, taking from the Court its discretion to prolong the time within which the sentence shall be executed. (6) It adds the terrors of a *post mortem* examination.

In Hartung vs. The People, 22 N. Y., 95, the Court held that the provision requiring confinement at hard labor in the State prison for one year prior to the infliction of the death penalty increased the punishment, and made the punishment greater than it was when the crime was committed.

In Commonwealth vs. McDonough, 95 Mass., 581, it was decided that the law enacted after the commission of the offense of which the defendant was charged which de-

creased the maximum of imprisonment that might have been inflicted and also the fine, was unconstitutional as to that offense for the reason that it fixed the minimum of imprisonment at three months; whereas before that time there was no minimum fixed to the Court's discretion.

So under the law of 1883 there was no maximum of time fixed to the Court's discretion as to when the sentence should be executed, while under the law of 1889 the sentence must be executed within four weeks from the day of sentence.

Again, under the Act of 1883 the sentence could not be executed within less than fifteen days from the time sentence was pronounced, whereas under the Act of 1889 it shall not be less than two weeks, nor more than four weeks from the day of passing such sentence. So that the law of 1889 renders it possible that the length of the prisoner's life may, by the sentence of the Court, be shortened at least one day. The principle involved is the same whether the life be shortened one day or one year. Slight changes in this respect have been held sufficient to render laws *ex post facto* and void as to past offenses.

A statute which changes the penalty for failure to ring a locomotive bell at crossings, from $50 absolutely to any sum not exceeding $100, is *ex post facto* and void as to past offences.

Wilson vs. Ohio, etc., R'y., 64 Ill., 542.
In re Petty, 22 Kas., 477.
Kring vs. Mo., 107 U. S., 221.
Shepherd vs. People, 25 N. Y., 406.
Hirschburg vs. People, 6 Colo., 145.
Garvey vs. People, 6 Colo., 559.
Cooley's Const. Lim., Sec. 270, *et seq.*
Moore vs. State, 43 N. J. L., 203.
Murray vs. State, *supra.*
Caldwell vs. State, 55 Ala., 153.

The law of 1889, in relation to the offence and its con-

sequences, alters the situation of the petitioner to his disadvantage, in the following respects: (1) It removes him within twenty-four hours from the time sentence is pronounced from the place of trial to the State Penitentiary, except in cases where conviction is had in the county where the State Penitentiary is located, and deprives him of the privilege of counsel altogether, or at an increased expense. (2) It deprives him of the privilege of arranging his affairs of business, except with some member of his family, attendant, counsel, physician or spiritual adviser, and then only in accordance with prison regulations. (3) It may deprive him, after conviction, of meeting his father, mother, brother, sister or other relative who do not or did not constitute members of his family. (4) It leaves the time of the execution of the sentence uncertain, and within the discretion of the Warden of the State Penitentiary, who may, having led the prisoner to believe that sentence would not be executed until a specified time, from mere caprice change the time for the execution of the sentence without any notification to the prisoner. (5) It lessens the possible time by one day of the duration of his life. (6) It takes from the Court its discretiion for good cause shown to prolong the time between the passing of sentence and execution thereof beyond the time specified in the statute.

The law is therefore *ex post facto* and void as to past offense.

In re Petty, *supra.*
Kring vs. Mo., *supra.*
Hartung vs. People, *supra.*
Shepherd vs. People, *supra.*
Hirschburg vs. People, *supra.*
Garvey vs. People, *supra.*
State vs. Willis, 66 Mo., 131.
Kuckler vs. People, 5 Park Cr. (N. Y.), 212.
Roberts vs. State, 2 Overt (Tenn.), 423.
Ratzky vs. People, *supra.*

This Court has the power to issue orginal writs of habeas corpus, and will exercise such power where it is expedient or necessary.

Ex parte Mirzan, 119 U. S., 584.
Ex parte Lange, 131 U. S. App., CCVII.

Respectfully submitted,

ROBERT W. BONYNGE,
Counsel for Petitioner Medley.

MORRIS, TEBBETTS & STOWELL,
Counsel for Petitioner Savage.

A. T. Britton
Henry Wise Garnett.
Of Counsel.

BRASCH & ROTHENSTEIN'S

TARIFF

for Parcels and Express goods to the United States of America

from all points in Germany and Austria.

Including all charges to Destination except Insurances, Duties, and Customhouse fees.

Through rates which apply if charges are payable by consignees.

States.	1 Kilog. $ c.	2 Kilog. $ c.	3 Kilog. $ c.	4 Kilog. $ c.	5 Kilog. $ c.	6 Kilog. $ c.	7 Kilog. $ c.	8 Kilog. $ c.	9 Kilog. $ c.	10 Kilog. $ c.	F. of each Kilog. $ c.
Alabama	1	1 44	1 88	2 32	2 80	3 08	3 40	3 73	4 05	4 38	25
Arkansas	1 25	1 70	2 15	2 60	3 05	3 34	3 85	3 95	4 25	4 55	25
California	1 50	2 34	3 15	4 05	4 88	5 38	5 88	6 38	6 88	7 38	50
Carolina	1	1 34	1 68	2 01	2 35	2 60	2 85	3 10	3 35	3 60	33
Colorado	1 25	2	2 75	3 30	4 25	4 60	4 95	5 30	5 60	5 95	25
Columbia, Distr.	 75	1 09	1 43	1 77	2 10	2 35	2 60	2 85	3 10	3 35	20
Connecticut	 63	 94	1 25	1 57	1 88	2 08	2 28	2 48	2 68	2 88	20
Dakota	1 38	2 13	2 88	3 63	4 38	4 73	5 08	5 43	5 78	6 13	50
Delaware	 63	 94	1 25	1 57	1 88	2 08	2 28	2 48	2 68	2 88	18
Florida	1 13	1 58	2 03	2 48	2 93	3 25	3 58	3 90	4 23	4 55	30
Georgia	1	1 44	1 88	2 31	2 75	3	3 25	3 50	3 75	4	28
Illinois	1	1 40	1 80	2 20	2 60	2 80	3	3 20	3 40	3 60	20
Indiana	1	1 40	1 80	2 20	2 60	2 80	3	3 20	3 40	3 60	20
Iowa	1 13	1 56	2	2 44	2 88	3 13	3 38	3 63	3 88	4 13	23
Kansas	1 13	1 69	2 25	2 81	3 38	3 63	3 88	4 13	4 38	4 63	28
Kentucky	1	1 40	1 80	2 20	2 60	2 85	3 10	3 35	3 60	3 85	20
Louisiana	1 25	1 63	2	2 38	2 75	2 98	3 20	3 43	3 65	3 88	20
Maine	 63	 95	1 28	1 60	1 93	2 13	2 33	2 53	2 73	2 93	18
Maryland	 63	1	1 38	1 75	2 13	2 33	2 53	2 73	2 93	3 13	20
Massachusetts	 63	 93	1 23	1 53	1 83	2 03	2 23	2 43	2 63	2 83	20
Michigan	1	1 44	1 88	2 25	2 63	2 83	3 03	3 23	3 43	3 63	23
Minnesota	1 25	1 70	2 15	2 60	3 05	3 35	3 65	3 95	4 25	4 55	30
Mississippi	1 25	1 70	2 15	2 60	3 05	3 35	3 65	3 95	4 25	4 55	30
Missouri	1 25	1 58	1 90	2 18	2 55	2 80	3 05	3 30	3 55	3 80	30
Montana	1 38	2 13	2 88	3 63	4 38	4 73	5 08	5 43	5 78	6 13	65
Nebraska	1 25	1 83	2 40	2 98	3 55	3 85	4 15	4 45	4 75	5 05	28
Nevada	2 98	3 36	3 75	4 70	5 66	6 21	6 75	7 29	7 83	8 38	65
New Hampshire	 63	 95	1 28	1 60	1 93	2 13	2 33	2 53	2 72	2 93	18
New Jersey	 63	 94	1 25	1 56	1 81	2 08	2 28	2 48	2 68	2 88	15
New Mexico	1 50	2 13	2 75	3 38	4	4 38	4 75	5 13	5 50	5 88	50
New York (city)	 30	 55	 80	1 05	1 30	1 43	1 55	1 68	1 80	1 93	11
Do. (State)	 63	 94	1 25	1 57	1 88	2 08	2 28	2 48	2 68	2 88	15
Ohio	 88	1 25	1 63	2	2 38	2 58	2 78	2 98	3 18	3 38	25
Oregon	1 63	2 38	3 13	3 88	4 63	5 13	5 63	6 13	6 63	7 13	75
Pennsylvania	 63	 94	1 25	1 57	1 88	2 08	2 28	2 48	2 68	2 88	18
Rhode Island	 63	 94	1 25	1 57	1 88	2 08	2 28	2 48	2 68	2 88	18
Tennessee	1	1 40	1 80	2 20	2 60	2 90	3 20	3 50	3 80	4 10	23
Texas	1 38	1 88	2 38	2 88	3 38	3 74	4 08	4 43	4 78	5 13	35
Utah Terr	1 38	1 93	2 48	3 03	3 58	3 95	4 33	4 70	5 08	5 45	38
Vermont	 63	 95	1 28	1 60	1 93	2 13	2 33	2 53	2 73	2 93	18
Virginia	1	1 40	1 80	2 20	2 60	2 85	3 10	3 35	3 60	3 85	20
Washington Terr	1 50	2 44	3 38	4 31	5 25	5 75	6 25	6 75	7 25	7 75	63
Wisconsin	1	1 43	1 85	2 28	2 70	2 93	3 15	3 38	3 60	3 83	20
Wyoming	1 50	2 44	3 38	4 31	5 25	5 75	6 25	6 75	7 25	7 75	60

Through rates which apply if charges are payable by senders.

Staat.	1 Kilog. M. Pf.	2 Kilog. M. Pf.	3 Kilog. M. Pf.	4 Kilog. M. Pf.	5 Kilog. M. Pf.	6 Kilog. M. Pf.	7 Kilog. M. Pf.	8 Kilog. M. Pf.	9 Kilog. M. Pf.	10 Kilog. M. Pf.	Jedes Kilog. mehr M. Pf.
Alabama	4	5 75	7 50	9 25	11	12 30	13 60	14 90	16 20	17 50	1 .....
Arkansas	5	6 80	8 60	10 40	12 20	13 40	14 60	15 80	17	18 20	1 .....
Californien	6	9 30	12 60	16 20	19 50	21 50	23 50	25 50	27 50	29 50	2 10
Carolina	4	5 35	6 70	8 05	9 40	10 40	11 40	12 40	13 40	14 40	1 30
Colorado	5	8	11	14	17	18 40	19 80	21 20	22 40	23 80	1 .....
Columbia Distr.	3	4 35	5 70	7 05	8 40	9 40	10 40	11 40	12 40	13 40	 80
Connecticut	2 50	3 75	5	6 25	7 50	8 30	9 10	9 90	10 70	11 50	 80
Dakota	5 50	8 50	11 50	14 50	17 50	18 90	20 30	21 70	23 10	24 50	2 .....
Delaware	2 50	3 75	5	6 25	7 50	8 30	9 10	9 90	10 70	11 50	 70
Florida	4 50	6 30	8 10	9 90	11 70	13	14 30	15 60	16 90	18 20	1 30
Georgia	4	5 75	7 50	9 25	11	12	13	14	15	16	1 10
Illinois	4	5 60	7 20	8 80	10 40	11 20	12	12 80	13 60	14 40	 80
Indiana	4	5 60	7 20	8 80	10 40	11 20	12	12 80	13 60	14 40	 80
Iowa	4 50	6 25	8	9 75	11 50	12 50	13 50	14 50	15 50	16 50	 90
Kansas	4 50	6 75	9	11 25	11 50	12 50	13 50	14 50	15 50	16 50	1 10
Kentucky	4	5 60	7 20	8 80	10 40	11 40	12 40	13 40	14 40	15 40	 80
Louisiana	5	6 50	8	9 50	11	11 90	12 80	13 70	14 60	15 50	 80
Maine	2 50	3 80	5 10	6 40	7 70	8 50	9 30	10 10	10 90	11 70	 70
Maryland	2 50	4	5 50	7	8 50	9 30	10 10	10 90	11 70	12 50	 80
Massachusetts	2 50	3 70	4 90	6 10	7 30	8 10	8 90	9 70	10 60	11 40	 80
Michigan	4	5 75	7 50	9	10 50	11 30	12 10	12 90	13 70	14 50	 80
Minnesota	5	6 80	8 60	10 40	12 20	13 40	14 60	15 80	17	18 20	1 20
Mississippi	5	6 80	8 60	10 40	12 20	13 40	14 60	15 80	17	18 20	1 20
Missouri	5	6 30	7 60	8 90	10 20	11 20	12 20	13 20	14 20	15 20	1 20
Montana	5 50	8 50	11 50	14 50	17 50	18 90	20 30	21 70	23 10	24 50	2 60
Nebraska	5	7 30	9 60	11 90	14 20	15 40	16 60	17 80	19	20 20	1 10
Nevada	11 90	13 45	15	18 80	22 65	24 85	27	29 15	31 30	33 50	2 60
New Hampshire	2 50	3 80	5 10	6 40	7 70	8 50	9 30	10 20	11	11 80	 70
New Jersey	2 50	3 75	5	6 25	7 50	8 30	9 10	9 90	10 70	11 50	 60
New Mexico	6	8 50	11	13 50	16	17 50	18	20 50	22	23 50	2 .....
New York (stadt)	1	2	3	4	5	5 50	6	6 50	7	7 50	 45
Do. (Staat)	2 50	3 75	5	6 25	7 50	8 30	9 10	9 90	10 70	11 50	 60
Ohio	3 50	5	6 50	8	9 50	10 30	11 10	11 90	12 70	13 50	1 .....
Oregon	6 50	9 50	11 50	15 50	18 50	20 50	22 50	24 50	26 50	28 50	3 .....
Pennsylvania	2 50	3 75	5	6 25	7 50	8 30	9 10	9 90	10 70	11 50	 70
Rhode Island	2 50	3 75	5	6 25	7 50	8 30	9 10	9 90	10 70	11 50	 70
Tennessee	4	5 60	7 20	8 80	10 40	11 60	12 80	14	15 20	16 40	 80
Texas	5 50	7 50	9 50	11 50	13 50	14 90	16 30	17 70	19 10	20 50	1 40
Utah Terr	5 50	7 70	9 90	12 10	14 30	15 80	17 30	18 80	20 30	21 80	1 50
Vermont	2 50	3 80	5 10	6 40	7 70	8 50	9 30	10 10	10 90	11 70	 70
Virginia	4	5 60	7 20	8 80	10 40	11 40	12 40	13 40	14 40	15 40	 80
Washington Ter	6	9 75	11 50	17 25	21	23	25	27	29	31	2 50
Wisconsin	4	5 70	7 40	9 10	10 80	11 70	12 60	13 50	14 40	15 30	 80
Wyoming	6	9 75	11 50	17 25	21	23	25	27	29	31	2 40

Goods from German points are to be directed to Brasch & Rothenstein at Bremen. From Austrian points to Brasch & Rothenstein at Vienna or to our nearest agency.

The above rates are not available for packages containing beds, feathers, flowers, embroideries, trimmings, toys, preserved insects, pictures, framed or unframed, hollow glass or hollow-ware, and all unusual light or loose packed goods, etc.

Shippers are cautioned against shipping Gunpowder, Oils, Acids, or anything of an explosive or inflammable character.

Invoices have to contain declaration of contents and value, and, if over 50 dollars, have to be certified by the U. S. Consul. Consular Invoices are also necessary for all goods going in bond.

To avoid unnecessary delay and expenses at New York, please send Invoice direct to our firm.

R. F. DOWNING & CO.'S

Custom-House Brokerage Department Rates.

Samples passed free, brokerage and fees	$1 10.
All entries value under $10, exclusive of fees	1 50.
" " " " 25, " "	2 —.
" " " " 50, " "	2 50.
" " " $50 and over	$3 — to 5 —.
Customs fees vary up to per Entry	1 20.

These rates are not guaranteed and are, where reason warrants, charged higher. Special contracts made to large Importers, and best satisfaction guaranteed.

P. T. O.

4107. Filed Aug. 19, 1887.

L. B. S. SAWYER, *Clerk.*

BRASCH & ROTHENSTEIN,

General Shipping and Forwarding Agents.

Central Office: **BERLIN W.** Friedrich-Strasse 78.

HAMBURG Holland. Brook, 22. | **LONDON E. C.** 1, New Basinghall Street. | **BREMEN** Langen-Strasse 96.

VIENNA Hegelgasse 7. | DITTERSBACH Waldenburg, Silesia. | DORTMUND Berg-Märk, Eisenbahn. | PARIS 15, Rue d'Hauteville.

FRANKFORT o. M. Friedenstrasse 2. | BENTHEIM Holländ, Grenze. | LEIPSIC Packhofstrasse 13. | FLUSHING Holland.

MÜHLHAUSEN Thüringen. | GOTHA Thüringen. | JLMENAU Thüringen.

SAALFELD Thüringen. | STUTTGART Langestrasse 12.

Agents in America:

R. F. DOWNING & CO., NEW-YORK.

20 Exchange Place.

This Through Bill of Lading covers the through rate, exclusive of Customs Charges, but Brasch & Rothenstein assume no responsibility whatever for the Property covered thereby, until the Goods are actually in the possession of the Railway Company or other Carriers at Port of Discharge, where the Goods will be received from the Ship under the customary forms of receipt given by the Railway Company or other Carriers.

B. & R. will assume no responsibility for charges incurred through delay or error in sending the necessary documents to the New York Office, with which to clear the Goods through the Custom House. When the Consignee elects to enter under Warehouse and Transportation Bonds, B. & R. are not responsible for any storage or cartage charges incurred thereby.

E. B. 586–590. five cases, 668 kilog.

San Francisco.

Reimbursement

Through freight

Insurance

Petties

Commission

As per specified account.

Through Bill of Lading to *New York.*

Shipped in apparent good order, and well-conditioned, by Mr. W. H. Hecht, Berlin, per Railroad or other conveyance, to the Port of Hamburg, to be there transhipped in and upon the Steamship called the "Roman," bound for NEW YORK, with liberty to sail with or without Pilots, to call at any intermediate Port or Ports for any purpose, and to tow and assist Vessels in all situations, five cases metal and glass ware, 668 kilog., being marked and numbered as in the margin to be delivered (subject to the exceptions, restrictions, and conditions of the undermentioned clauses) from the Ship's Deck (where the Shipowner's responsibility shall cease) in the like good order, and well-conditioned, at the aforesaid Port of NEW YORK, unto R. F. DOWNING & CO., and to be by them forwarded thence, per Railroad or other conveyance, to Mr. Emile Boesch, San Francisco, Cal., or to his or their assigns. Freight and Charges for the said goods to be paid by consignee, as per margin, with primage and average accustomed. The conveyance by Railroad is subject to the conditions of the Railroad Companies.

With liberty in the event of the Steamer putting back to or into any Port, or being otherwise prevented from any cause from commencing or proceeding in the ordinary course of her voyage, to proceed under sail, or in tow of any other Vessel, or in any other manner which the Shipowner shall think fit, and to ship or tranship the Goods by any other Vessel. Not responsible for the Act of God, the Emperor's Enemies, Pirates, Robbers, Thieves, Vermin, Barratry of Master and Mariners, Restraints of Princes, Rulers, or People, Loss or Damage resulting from Stowage, Sweating, Insufficiency of Packages in size, strength, or otherwise, Leakage, Breakage, Pilferage, Wastage, Spray, Rain, Rust, Frost, Decay, Contact with, or Smell or Evaporation, from any other Goods, Inaccuracies in Obliteration, Insufficiency, or absence of marks, numbers, or addresses, or description of goods shipped, Injury to Wrappers, however caused. Lighterage to or from the Vessel, Transhipment, Jettison, Explosion, Heat, Fire, at any time or in any place, Boilers, Steam, Machinery (including consequence of defect therein or damage thereto), Collision, Stranding, Straining, or other Perils of the Seas, Rivers, Navigation or Land Transit of whatsoever nature or kind, and all Damage, Loss, or Injury arising from the Perils or things above mentioned, and whether such perils or things arise from the negligence, default, or error in judgment of the Pilot, Master, Mariners, Engineers, Stevedores, or other persons in the service of the Shipowner.

Weight, Measure, Gauge, Quality, Condition, Quantity, Brand, Contents, and Value unknown, and the Carrier not accountable for same.

The Carriers are not accountable to any extent for Bullion, Specie, Precious Metals, manufactured or unmanufactured, Plated Articles, Glass, China, Jewelry, Articles used for Jewelry, Precious Stones, Trinkets, Watches, Clocks, Timepieces, Mosaics, Bills, Bank Notes of any Country, Orders, Notes, or Securities for payment of Money, Stamps, Maps, Letters, Writings, Title Deeds, Paintings, Engravings, Pictures, Statuary, Silks, Furs, Lace, or Cashmere, manufactured or unmanufactured, made up into Clothes or otherwise, contained in any package or parcel, whatever may be the value of such articles, nor for any other goods of whatever description above the value of £100 per package, unless the value be herein expressed, and extra Freight as may be agreed on be paid.

The Carriers are not to be liable for any damage to any Goods which is capable of being covered by Insurance, nor for any claim, notice of which is not given before removal of the Goods, nor for claims for damage or detention to Goods under Through Bills of Lading, where the damage is done or detention occurs whilst the Goods are not in the possession of the Carriers; nor in any case for more than the invoice or declared value of the Goods, whichever shall be the least. Goods must be taken delivery of by Consignees within Twenty-four hours after arrival at the Railroad Station or other place to which they are destined. Any damage to Goods for which the Carrier is liable must be claimed against the Company in whose actual custody the same may be at the time of accident.

Not liable for delivery of Sample Parcels or Consignees' Letters, nor for any claim resulting therefrom. Goods of an inflammable, explosive, or otherwise dangerous character, shipped without permission, and without full disclosure of their nature, may be seized and confiscated or destroyed by the Carrier at any time before delivery, without any compensation to the Shipper, Owner, or Consignee.

All Fines, Expenses, Losses, or Damage which the Carriers, their Agents or Servants, or the Ship or Cargo, may incur or suffer, on account of incorrect or insufficient marking of the packages, or description of their contents, or the dangerous nature of such contents, shall be paid by the Shipper or Consignee, as may be required, and the Carrier shall have a lien upon the Goods for the payment thereof.

The only condition on which Glass will be carried is that the Carrier shall not be held liable for any Breakage which may occur, whether from negligence or any other cause whatever.

Freight, if payable by Shippers, is due in full in exchange for Bill of Lading, or if payable by Consignees, on arrival of Goods at place of destination, in exchange for Delivery Order, settlement in either case to be made without discount or abatement. Freight payable by Shippers, to be paid Ship lost or not lost. Freight payable by Consignees to be in Currency or Gold (at the current Rate of Exchange for Banker's sight Bills on London on the date the Steamer's arrival), at Consignees' option.

Freight on Goods to Order, Liquids, and brittle or perishable Goods payable by Shippers, if required.

This Bill of Lading, duly endorsed, to be given in Exchange for Delivery Order.

In case the whole or any part of the Goods specified herein be prevented by any cause from going in said Steamer, the Shipowner is only bound to forward them by succeeding Steamers of this line, and in all cases the liability of the Shipowner, on account of all Goods, shall cease as soon as the Goods are delivered from the Ship's tackles.

The Transportation Companies above named are not liable for loss occasioned by Collision, Fire, Mob, Riot, Insurrection, or Rebellion, nor for any danger incidental to railroad transportation.

In accepting this Bill of Lading the Shipper, Owner, or Consignee of the Property carried expressly accepts and agrees to all its stipulations, exceptions, and conditions, whether written or printed.

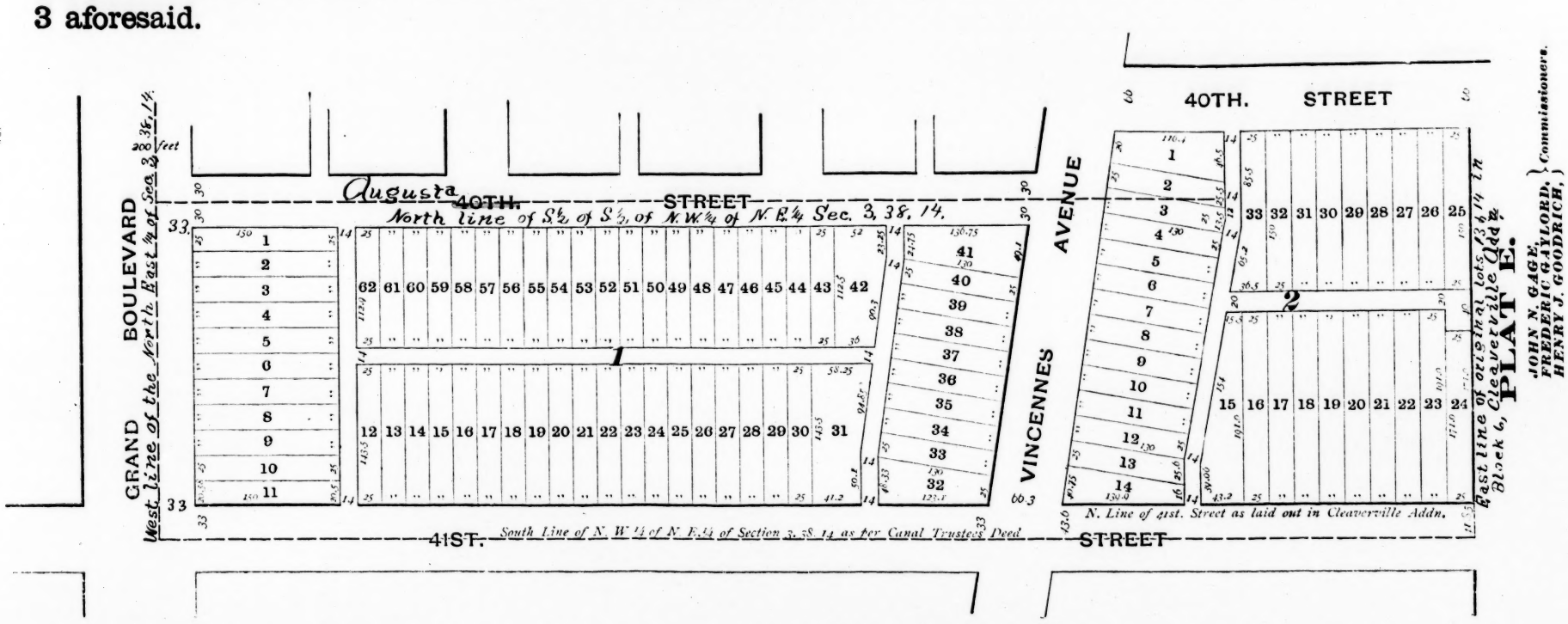
In witness whereof BRASCH & ROTHENSTEIN have affirmed to two Bills of Lading, all of this tenor and date, the one of which Bills being accomplished, the other to stand void.

Dated in Berlin, Nov'b'r 2d, 1886.

Ppa. BRASCH & ROTHENSTEIN.
JULIUS ROTHENSTEIN.

"McKEY'S ADDITION TO HYDE PARK"

being a Subdivision made by Circuit Court Commissioners in Partition of that part of the South ten acres of the North West quarter of the North East quarter of Section 3, Town 38 North, Range 14 East of the 3rd Principal Meridian lying West of the West line of Vincennes Avenue; together with lots 13 to 23, both inclusive of Block 6 in Cleaverville Addition, a Subdivision in the North East quarter of Section 3 aforesaid.



STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

I, EDGAR B. TOLMAN, a Notary Public in and for the said County in the State aforesaid do hereby certify that on this day personally appeared before me **JOHN N. GAGE, FREDERIC GAYLORD and HENRY J. GOODRICH,** *to me personally known to be the same persons named in the certificate of* **SAMUEL S. GREELEY,** *surveyer of the survey and Subdivision shown upon this plat, and to be such Commissmissioners as they are therein described to be, and acknowledged that they had caused said survey and subdivision and this plat thereof to be made in pursuance of the decree of the Circuit Court of Cook County in said certificate mentioned, and in pursuance of the provisions of the Statute in such case made and provided.*

In Testimony Whereof, *I have hereunto set my hand and affixed my Notarial Seal this sixth day of September, A. D. 1882.*

SEAL

EDGAR B. TOLMAN
Notary Public.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

I hereby certify that I have surveyed that part of the South ten acres of the North West quarter of the North East quarter of Section 3, Town 38 North, Range 14 East of the 3d Principal Meridian, lying West of the West line of Vincennes Avenue, together with lots 13 to 23, both inclusive of Block 6 in Cleaverville Addition, a Subdivision in the North East quarter of Section 3 aforesaid, and that I have subdivided the same into blocks, lots, streets and alleys, under the direction of **JOHN N. GAGE, FREDERIC GAYLORD and HENRY J. GOODRICH,** *Commissioners appointed to make partition of said premises in and by a decree of the Circuit Court of said County, entered May 25th, A. D. 1882, in Case No. 39801, wherein* **WILLIAM D. McKEY** *and others are complainants, and* **RICHARD M. McKEY** *and others are defendants. I further certify, that the above plat correctly represents said subdivision as surveyed and staked by me.*

The above plat is drawn to a scale of 200 feet to one inch. Chicago, September 5th, A. D. 1882.

SAMUEL S. GREELEY.
Surveyor.

Committee recommend that above Plat be approved,

GEO. H. LEONARD,
W. M. BERRY.

State of Illinois, } ss.
COUNTY OF COOK.
VILLAGE OF HYDE PARK. }

Approved by the President and Board of Trustees, this 8th day of September, 1882.

E. W. HENRICKS,
Village Clerk.

(SEAL OF HYDE PARK.)

State of Illinois, } ss.
COOK COUNTY. }

SEAL

This Plat, approved in all particulars by the Court, and it is ordered that the same be recorded in the recorder's office of the County of Cook aforesaid. This certificate is made in pursuance of a decree of the Circuit Court of Cook County, in the State of Illinois, entered on the sixth day of October, A. D. 1882, in Case No. 39801, in which ***WILLIAM D. McKEY*** *and others are complainants, and* ***RICHARD M. McKEY*** *and others are defendants.*

JACOB GROSS,
Clerk

State of Illinois. } ss. No. 424,229.
COOK COUNTY.

RECORDED

Oct. 6, A. D. 1882, at 2 o'clock P. M., in Book 17 of Plats, Page 58.

JAS. W. BROCKWAY,
Recorder.

CHICAGO LEGAL NEWS CO. PRINT.

-19-

William D. McKey vs. Hd Village of Hyde Park } Page 58½ No. 1421.

COPY.

58½

Plat of Sects. 2 & 3, T. 38 N. R. 14 E. 3rd P.M.